(22,315)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 135.

THOMAS B. STUART AND CHARLES A. MURRAY, PETITIONERS,

vs.

UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be It Remembered, that heretofore and on, to-wit, the sixth day of November, A. D. 1906, came Messrs. Dorsey and Hodges, attorneys of said court, appearing for defendant Union Pacific Railroad Company, and filed in said court a transcript of proceedings theretofore had in the district court of the second judicial district of the state of Colorado, sitting in and for the city and county of Denver, in a certain case in said district court then pending, wherein Thomas B. Stuart and Charles A. Murray were plaintiffs and Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Colorado Eastern Railroad Company were defendants.

And the said transcript is in words and figures as follows, to-wit:

District Court, City and County of Denver. Second Judicial District.

State of Colorado,
City and County of Denver—ss.

Pleas in the district court of the city and county of Denver, state of Colorado, in the fourth division thereof, before the Hon. F. T. Johnson, one of the Judges of the second judicial
2 district of the said state, at a term thereof begun and held at the Court House in Denver, in said county, on the second Tuesday (it being the 9th day) of April, A. D. one thousand nine hundred and six.

Present: Hon. F. T. Johnson, one of the Judges of the District court
George Stidger, Esq., District Attorney of said district,
Alexander Nisbet, Esq., Sheriff of said county,
Otis B. Spencer, Esq., clerk of said court.

Be It Remembered, that heretofore and on, to-wit, the twenty-fourth day of April, A. D. 1906, came the plaintiffs herein by their attorneys, and filed herein their action in equity to quiet title.

And said action is in words and figures as follows, to-wit:

State of Colorado,
City and County of Denver—ss.

In the District Court.

Thomas B. Stuart and Charles A. Murray, Plaintiffs.
No. ..... vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Colorado Eastern Railroad Company, Defendants.

Action in equity to quiet title.

To the Honorable District Court aforesaid, Sitting in Equity:

The plaintiffs Thomas B. Stuart and Charles A. Murray,
3 respectfully state:

1st: That they are the owners in fee simple absolute of the following real estate situated in the city and county of Denver, (formerly in Arapahoe county) Colorado, to-wit:

The east half (E ½) of the northwest quarter (NW ¼) and the northeast quarter (NE ¼) of the southwest quarter (SW ¼) and the northwest quarter (NW¼) of the southeast quarter (SE ¼) section twenty (20) township three (3) south of range sixty-seven (67) west.

2nd. That said land was entered by one Erastus E. Eastman, and was by him purchased from the United States and a certificate of purchase issued to said Eastman therefor from said United States on the 2nd day of January, 1867. That said certificate was duly and properly recorded in the proper records of Arapahoe county, Colorado, on the 12th day of July, 1867. That afterwards in accordance with the purchase aforesaid and in affirmance thereof, the United States on October 1st, 1867, issued its patent to said land to the said Erastus E. Eastman, and said patent was afterward recorded in the proper records of Arapahoe county, Colorado.

3rd. That on the 4th day of January, 1867, the said Erastus E. Eastman, for the consideration of one thousand dollars at the time in hand paid to him, by one Andy M. Adams,
4 sold said land to the said Adams, and at the request of the said Adams, conveyed the title thereof by warranty deed to one John W. Iliff, the said Iliff acting for and in behalf of the said Andy M. Adams, and having no interest whatever in said land, except as trustee for said Adams, that plaintiffs are now the owners of the title of the said Andy M. Adams, including all the title conveyed by the said deed to John W. Iliff, aforesaid.

4th. That plaintiffs before and ever since the 2nd day of January, 1867, down to the present time, through their grantors and by themselves have held and been in possession of said lands and have exercised all rights of ownership thereover and have paid all taxes levied upon said lands and all parts thereof.

5th. That each of the defendants are corporations organized for railroad purposes and each of said defendants claim an estate or interest in the lands above described adverse to these plaintiffs, and this action is brought for the purpose of determining such adverse claim, interest or estate as the said defendants and each of them may have, or claim to have in and to said real property.

Plaintiffs allege that in truth and in fact neither of said defendants has any title or interest or any right, joint or several, whatever in or to said land, or any part thereof, but that the entire ownership, possession and right of possession in
5 and to said land, and all parts thereof are in these plaintiffs.

6th. That the wrongful claims of the defendants aforesaid render the lawful title of the plaintiffs unmerchantable and greatly depreciates the value of the plaintiff's said property and are and will continue to be a cloud upon the title of plaintiffs to said property until they shall be removed by decree of the court herein.

Wherefore the plaintiffs pray that the defendants and each of them may be compelled distinctly and particularly to plead and set forth each and all of their claims in and to said land, and that all such claims estates or interests shall be adjudged by final decree herein of no effect.

That plaintiff's title to said land and all parts thereof be forever quieted as against the defendants and each of them and plaintiffs right to the continued possession of all of said land be decreed. That plaintiffs also have judgment for costs and for all other and proper relief.

J. C. HELM, and
STUART & MURRAY,
Attorneys for Plaintiff.

State of Colorado,
City and County of Denver—ss.

Thomas B. Stuart, being first duly sworn, upon his oath, says that he is one of the plaintiffs in the within entitled
6 cause; that he has read the within and foregoing complaint, and knows the contents thereof, and that the

same is true of his own knowledge and belief, except as to such matters as are therein stated upon information and belief.

THOMAS B. STUART.

Subscribed and sworn to before me this 21st day of April, 1906. My commission will expire April 29, 1909.

(Seal) GOBIN STAIR, Notary Public.

Endorsed: No. 40590. In the District Court, City and County of Denver. Thomas B. Stuart, and Charles A. Murray, Plaintiffs, vs. The Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Colorado Eastern Railroad Company, Defendants. Action in Equity to Quiet Title. Filed in District Court, City and County of Denver Apr. 24, 1906, Otis B. Spencer, Clerk. J. C. Helm and Stuart & Murray, Attorneys for Plaintiffs.

And afterwards, and on, to-wit, the 11th day of May, A. D. 1906, came the petitioner herein, The Union Pacific Railroad Company, by its attorneys respectively, and filed herein its petition and bond on removal to the United States circuit court:

And said petition is in words and figures as follows, to-wit:

State of Colorado,
City and County of Denver—ss.

In the District Court.

Thomas B. Stuart and Charles A. Murray, Plain-
7 tiffs,

vs.

Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, defendants.

Petition for removal to the circuit court of the United States For the District of Colorado.

To the Honorable The Judges of the district court within and for the city and county of Denver, in the state of Colorado:

The petition of the defendant Union Pacific Railroad Company a corporation, praying specially for the purpose of this petition and for an order of removal of this action as hereinafter prayed therein, and for none other, most respectfully shows that it is one of the defendants in this suit, which is of a civil nature; that the matter or amount in dispute in this

cause, exceeds the sum or value of two thousand ($2,000) dollars exclusive of interest and costs.

Your petitioner further shows that in the above entitled suit there is a controversy which is wholly between citizens of different states, to-wit, a controversy between your petitioner Union Pacific Railroad Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been and still is a citizen and resident of the state of Utah and is a corporation organized and existing under and by virtue of the laws of the state of Utah, and the said Thomas
8 B. Stuart and Charles A. Murray, who your petitioner avers were at the time of the commencement of this suit, ever since have been and still are citizens and residents of the state of Colorado and that your petitioner was not at the time of the commencement of this suit, nor has it since been nor is it now, a resident or citizen of the state of Colorado.

Your petitioner further avers that there exists in this action a separable controversy, which is wholly between citizens of the state of Colorado, to-wit, said plaintiffs and a citizen of another state, to-wit, your petitioner, and that the same can be fully and completely determined between said parties without the presence of any other party of record whatsoever; that said separable controversy consists in this, to-wit: The question as to whether your petitioner has any claim, right, title or interest in law or equity, in and to the property described in said complaint, and that the question as between your petitioner and the plaintiffs herein is wholly and entirely different, separate and distinct, from the question whether or not the other defendants or either of them, have any right, title interest claim or demand, in law or equity in and to said property.

And your petitioner further avers that the right, title, claim, and interest which your petitioner asserts in and to the
9 property described in said complaint is a right, title interest, claim, and demand in and to a separate and divided part of said land, and that said other defendants neither jointly nor severally have or assert any right, title, interest, claim or demand, in and to said divided and separable part of said property; and that your petitioner claims no right, title or interest in and to the [—] or any other separate or divided part of said property in and to which separate and divided part or parts said other defendants have and assert a right, title, interest, claim and demand.

And your petitioner further shows that said defendant The Kansas Pacific Railway Company, has not been served with process in this court.

And your petitioner further shows that it desires to remove this suit, for the trial thereof into the next circuit court of the United States to be held in said district of Colorado, and your petitioner offers herewith a bond, with good and sufficient surety for its entering in said circuit court of the United States on the first day of the next session, a copy of the record in this suit; and for paying all costs that may be awarded by said circuit court, if said court should hold that this suit was wrongfully or improperly brought thereto and it prays this court to proceed no further herein except to make an order for removal, and to accept the said surety and bond, and to cause the
10 record herein to be removed in said circuit court of the United States within and for the district of Colorado.

UNION PACIFIC RAILROAD COMPANY,
By Dorsey & Hodges,
Its attorneys.

State of Colorado,
City and County of Denver—ss.

William V. Hodges, being first duly sworn, on oath says that he is one of the attorneys for the defendant Union Pacific Railroad Company, in the above entitled cause; that he has read the foregoing petition, and knows the contents thereof, and that the statements therein contained are true to the best knowledge and belief of affiant.

WILLIAM V. HODGES.

Subscribed and sworn to before me this 11th day of May, A. D. 1906. My commission expires Dec. 1, 1906.

(Seal) HENRY B. TELLER.
Notary Public.

(Endorsed) No. 40590. In the District Court of City and County of Denver, Colo. Thomas B. Stuart and Charles A. Murray, Plaintiffs, vs. Union Pacific Railroad Co., et al., Defendants. Petition for Removal to the Circuit Court of U. S. for the District of Colorado. Filed in District Court, City and County of Denver, May 11th, 1906, Otis B. Spencer, Clerk, Dorsey & Hodges, Attorneys for Deft. U. P. R. R. Co.

11 And Afterwards, and on, to-wit, the 11th day of May, A. D. 1906, the following bond on removal to the United States circuit court was filed in our said court.

And said bond is in words and figures as follows, to-wit:

State of Colorado,
City and County of Denver—ss.

In the District Court.

Thomas B. Stuart and Charles A. Murray, Plaintiffs,
vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, Defendants.

Bond for removal to the Circuit Court of the United States.

Know All Men by these Presents, that Union Pacific Railroad Company as principal, and National Surety Company as sureties are held and firmly bound unto Thomas B. Stuart and Charles A. Murray, in the penal sum of five hundred ($500.00) dollars for the payment whereof well and truly to be made to the said Thomas B. Stuart and Charles A. Murray, their heirs and assigns, we bind ourselves, our heirs, executors and administrators, representatives, successors and assigns, jointly and severally firmly by these presents.

Yet, upon these conditions, that said Union Pacific Railroad Company, having petitioned the district court, within
12 and for the City and County of Denver, State of Colorado, for the removal of a certain cause therein pending, wherein the said Thomas B. Stuart and Charles A. Murray are plaintiffs and said Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Colorado Eastern Railroad Company, are defendants, to the Circuit Court of the United States for the District of Colorado.

Now if the said Union Pacific Railroad Company shall enter in said Circuit Court, of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court, of the United, [—] if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to be and remain in full force and effect.

Witness our hands this 11th day of April, A. D. 1906.

UNION PACIFIC RAILROAD COMPANY,
By William V. Hodges, atty.

NATIONAL SURETY COMPANY,
By Ralph Smith, Attorney in fact.

(Seal)

State of Colorado,
City and County of Denver—ss.

..... and ....
the sureties named in the foregoing bond, each being
13 first duly sworn, on his oath, says each for himself and not one for the other that he is a resident of the.....
County of ..... State of Colorado, and a property holder therein, that he is worth the sum of one thousand ($1,000) dollars over and above all his debts and liabilities and exclusive of property by law exempt from levy and sale on execution.

.....

Subscribed and sworn to before me this .... day of May, A. D. 1906.
My commission expires .....

.....
Notary Public.

The within bond and the above named sureties are hereby approved this 11th day of May, A. D. 1906.

By the Court

F. T. JOHNSON, Judge,
OTIS B. SPENCER,
Clerk of District Court in and for the City and County of Denver, Colorado.
By J. S. Brown, Deputy Clerk.

State of Colorado,
City and County of Denver—ss.

On this 11th day of May one thousand nine hundred and six, before me personally came Ralph W. Smith, known to me to be the attorney in fact of the National Surety Company, the corporation described in and which executed the within
14 and foregoing bond of Union Pacific Railroad Company, et al., as a surety thereon, and who being by me duly sworn, did depose and say that he resides in the city of Denver, state of Colorado, that he is the attorney in fact of said company and knows the corporate seal thereof, that the said National Surety Company, is duly and legally incorporated under the laws of the state of New York, that the seal affixed to the within bond is the corporate seal of said company, and was thereto affixed by order and authority of the Board of Directors of said company, and that he signed his name thereto, by like order and authority as attorney in fact of said company, and that the signature of said Ralph W. Smith, sub-

scribed to said bond, is the genuine handwriting of said Ralph W. Smith and was thereto subscribed by order and authority of said Board of Directors and that the assets of said Company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature by more than the sum of five hundred thousand dollars ($500,000) that the National Surety Company has complied with all the laws of the State of Colorado relating to surety companies doing business in said state and is duly licensed and legally authorized by such state to qualify as sole surety on the bond hereto annexed.

RALPH W. SMITH,
Deponent's Signature.

Sworn to, acknowledged before me and subscribed in my presence this 11th day of May, 1906.
My commission expires August 16, 1909.

(Seal)

C. H. TONCRAY,
Notary Public.

15 Endorsed: No. 40590. In the District Court of City and Co. of Denver, Colo. Thos. B. Stuart and Charles A. Murray, Plaintiffs, vs. Union Pacific R. R. Co., et al., Defendants. Bond for Removal. Filed in District Court, City and County of Denver, May 11, 1906. Otis B. Spencer, Clerk. Dorsey & Hodges, Attorneys for Deft., U. P. R. R. Co.

And afterwards, and on, to-wit, the 11th day of May, A. D. 1906, the same being one of the regular juridical days of the April Term, A. D. 1906, of said court, the following proceedings inter alia were had and entered of record in said court, to-wit:

Thomas B. Stuart and Charles A. Murray,
40590. vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company.

Order of removal.

The defendant herein, Union Pacific Railroad Company, having within the time provided by law filed its petition for removal of this cause to the circuit court of the United States for the district of Colorado, and having at the same time offered bond in the sum of five hundred dollars, with good and sufficient surety pursuant to statute and conditioned according to law, and the same being submitted to this court and the court being fully advised in the premises, finds that said petition should be granted.

16 It is therefore ordered by this court, that said petition be sustained and that said cause be removed to the next term of the circuit court, of the United States for the district of Colorado, pursuant to statute of the United States in such cases made and provided and that all other proceedings of this court be stayed.

F. T. JOHNSON, Judge.

Dated 11th 1906.

And Afterwards, and on, to-wit, the 12th day of May, A. D. 1906, came the defendant herein by its attorneys, Messrs. Rogers, Cuthbert & Ellis, and filed herein its motion to make complaint more specific and certain.

And said motion is in words and figures as follows, to-wit:

State of Colorado,
City and County of Denver—ss.

In the District Court.

Thomas B. Stuart and Charles A. Murray, Plaintiffs,
vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, Defendants.

Motion to make complaint more specific and certain.

Now comes the defendant The Colorado Eastern Rail-
17 road Company by Rogers, Cuthbert & Ellis, its attorneys and moves the court for the entry of an order herein requiring the plaintiffs to make their complaint on file herein more specific and certain in the following particulars viz: by stating and showing:

1. In what manner through what conveyance or conveyances and for what consideration the said plaintiffs acquired if at all the alleged title or titles of Andy M. Adams, and John W. Iliff mentioned in paragraph numbered 3rd of said complaint.

2. Whether the said Andy M. Adams and John W. Iliff, or either of them, conveyed said alleged title direct to the said plaintiffs or whether the said alleged title was conveyed through mesne conveyances to the said plaintiffs and if so, through what mesne conveyances.

3. In what manner through what conveyance or conveyances and for what consideration the said plaintiffs acquired if

at all the alleged possession of the lands in said complaint mentioned and described.

4. Under what alleged title or claim of title the said plaintiffs have held and now hold possession of the lands mentioned and described in said complaint, as therein alleged.

And as grounds for said motion this defendant says that the said complaint in the particulars above mentioned is so general and indefinite in its allegations that this defendant can-
18 not ascertain therefrom and it cannot be readily understood from said complaint how plaintiffs acquired or obtained their alleged title or possession of the lands in said complaint described after the alleged conveyance of said premises on the 4th day of January, 1867, to the said John W. Iliff, for the alleged use and benefit of the said Andy M. Adams.

ROGERS, CUTHBERT & ELLIS,
Attorneys for said defendant The Colorado Eastern Railroad Company.

Endorsed: No. 40590. In the District Court of the City and County of Denver. Thomas B. Stuart, et al., Plaintiffs, vs. Union Pacific Railroad Co. et al., Defendants. Motion by Deft. The Colo. Eastern Railroad Co. for Plffs. to make Complaint more specific and certain. Filed in District Court, City and County of Denver May 12, 1906. Otis B. Spencer, Clerk. Rogers, Cuthbert & Ellis, Attorneys for deft. The Colo. Eastern Railroad Company.

State of Colorado,
City and County of Denver—ss.

I, Otis B. Spencer, clerk of the district court of the city and county of Denver, state aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of all papers filed and all orders of court, had and entered of record in a certain cause in said court lately depending, wherein Thomas B. Stuart and Charles A. Murray are
19 plaintiffs and Union Pacific Railroad Company, et al., are defendants, as the same now remains on file and of record in this office.

Witness my hand and seal of said court, at the Court House in Denver, county and state aforesaid, this 24th day of May, A. D. 1906.

(Seal Dist. Ct. City and) OTIS B. SPENCER, Clerk.
(County of Denver) By J. S. Brown, Deputy Clerk.

Endorsed: 4953. No. 40590. Thomas B. Stuart, et al., Plaintiff, vs. Union Pacific Railroad Company et al., Defendant. Record on Removal to United States Circuit Court. Filed Nov. 6, 1906, Charles W. Bishop, Clerk. District Court, Denver, Colo. Otis R. Spencer, Clerk.

Twenty-first Day, November Term. Friday, November 30th, A. D. 1906.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the sixth day of November, A. D. 1906.

Thomas B. Stuart and Charles A. Murray,
4953 vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company.

In Chancery. Bill to quiet title.

This cause coming on now to be heard on the motion to remand, and is argued by counsel, Thomas B. Stuart, Esquire appearing as solicitor for the complainants, and C. C. Dorsey, Esquire, appearing as solicitor for the respondents. And thereupon, on consideration thereof;

It is ordered by the court that the said motion be and the same is hereby denied.

It is further ordered by the court that the respondents plead to the bill of complaint herein within ten (10) days from this day as they shall be advised.

In the Circuit Court of the United States for the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Plaintiffs,
No. 4590. vs. In Equity.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, Defendants.

Answer of Union Pacific Railroad Company.

This defendant, Union Pacific Railroad Company, a corporation organized and existing under the laws of the state of Utah, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is ad-

vised it is material or necessary for it to make answer to,
21 answering says:

That this defendant was at the time of the commencement of this action, for a long time prior thereto had been, ever since has been, and now is a corporation organized and existing under the laws of the state of Utah, and a citizen and resident of the said state of Utah, and that it was not at any of said times, and is not now either a citizen or a resident of the state of Colorado that the complainants herein, Thomas B. Stuart and Charles A. Murray, were, and each of them was, at the time of the commencement of this action, for a long time prior thereto had been, ever since have been, and now are citizens and residents of the state of Colorado.

And further answering the averments in said bill of complaint contained, this defendant denies that the complainants herein are now, or were at the time of the commencement of this action, the owners in fee simple absolute of the real estate described in paragraph 1 of said bill of complaint; but avers that neither the said complainants, or either of them, are now, or were at the time of the commencement of this suit, the owners in fee simple absolute, or otherwise, or at all, interested in a strip of land four hundred (400) feet in width, being two hundred (200) feet on each side of the center line of the main track of this defendant, where the same traverses the
22 lands or portions thereof described in said bill of complaints, as is hereafter more specifically set forth.

Further answering, defendant admits that one Erastus E. Eastman on the 2nd day of January, A. D. 1867, received a certificate of purchase from the United States, containing a description of land substantially as the same are described in the first paragraph of said bill of complaint; and further admits that said certificate was recorded, as alleged in said bill of complaint; and further admits that the United States on October 1st, A. D. 1867, issued its patent to certain lands to the said Erastus E. Eastman, describing the same substantially by the description set forth in the first paragraph of said bill of complaint; but defendant avers that neither the said certificate of purchase nor the said patent conveyed, or was intended to convey, or vested, or was intended to vest, in the said Eastman any right, title or interest whatsoever in or to said strip of land four hundred (400) feet in width, which is hereinabove referred to and hereinafter more specifically described, as the same passes over the lands described in said bill of complaint, or any portion thereof.

As to the allegations contained in the third paragraph of said bill of complaint, this defendant says that it does not know, and cannot set forth as to its belief or otherwise, whether
23 or not it is alleged or is the fact that said various sales and transfers of said title, or any of them, occurred as alleged in said third paragraph, or otherwise, or at all, or that plaintiffs are now the owners of the title of the said Andy M. Adams, including all the title conveyed by the said deed to John W. Iliff, mentioned in said third paragraph; but this defendant avers that none of said conveyances, if in truth any of them were made, conveyed any title whatsoever to said strip of land four hundred (400) feet in width, hereinabove and hereinafter mentioned, and specifically denies and says that it is not a fact that plaintiffs, or either of them, are now the owners of any right, title or interest whatsoever in or to said strip four hundred (400) feet in width, hereinbefore referred to and hereinafter more specifically described, or any part thereof.

Further answering, this defendant says that it does not know, and cannot set forth as to its belief or otherwise, whether or not it is alleged or is the fact that before and ever since the 2nd day of January, A. D. 1867, or at any other time or times, down to the present time, through their grantors or by themselves, or otherwise, said plaintiffs have held and been in possession of said lands described in said bill of complaint, or any portion thereof, or have exercised all or any rights of ownership thereover, or have paid any taxes levied upon
24 said lands, or any part thereof; but defendant specifically denies and says that it is not true that said plaintiffs, either through their grantors or by themselves, or otherwise, at any of the times mentioned in said bill of complaint, or at any other time, have held or been in possession of said strip of land four hundred (400) feet in width, hereinabove referred to and hereinafter more specifically described, or have exercised all or any rights of ownership thereover; and this defendant specifically denies that the plaintiffs, or either of them, or their grantors, or any of them, or anyone on their behalf, has paid all or any of the taxes levied upon said strip of land four hundred (400) feet in width, or any part thereof.

Further answering said bill of complaint, this defendant admits, as it has heretofore alleged, that it is a corporation, and that it is organized for railroad purposes; and admits, as it has heretofore and will hereafter more at length aver, that it claims an estate and interest in a part of the lands described in said bill of complaint, to-wit: said strip of land four hundred (400) feet in width, extending across the same, and avers

that it is the owner of said strip, and that neither the plaintiffs, or either of them, have any right, title or interest in said strip, or any part thereof, or ever have had. And defendant says that it is not true, and specifically denies that this de-
25 fendant has no title or interest in or to said lands, or any part thereof, and specifically denies and says that it is not true that the entire ownership, possession and right of possession in and to said lands described in said bill of complaint, and all parts thereof, are in the said plaintiffs, or either of them.

And further answering said bill of complaint, this defendant says that its claim of title to said strip of land four hundred (400) feet in width is not a wrongful claim; and denies that it greatly, or at all, depreciates the value of any property of the plaintiffs, or either of them; and denies that it is or will continue to be a cloud upon the title of plaintiffs' to any property in which said plaintiffs, or either of them, have any right, title or interest; and specifically avers that neither the said plaintiffs, or either of them, have now, or ever have had, any right, title or interest whatsoever in or to said strip of land four hundred (400) feet in width, hereinabove referred to and hereinafter more specifically described.

And further answering said bill of complaint, this defendant avers that by an Act of the Congress of the United States, approved July 1st, A. D. 1862, and entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other pur-
26 posses," there was created, a corporation by the name style and title of "The Union Pacific Railroad Company," and said corporation was thereby authorized to lay out, locate, construct, furnish, maintain and enjoy a railroad and telegraph line from a point on the 100th meridian of longitude west from Greenwich, between the south margin of the Valley of the Republican River and the North margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory; and in and by said Act of Congress there was granted to said corporation so created the right of way through the public lands for the construction of said railroad and telegraph line to the extent of two hundred (200) feet in width on each side of said railroad, where it might pass over the public lands, including all necessary grounds for stations, buildings, work-shops and depots, machine-shops, switches, sidetracks, turn-tables and water stations; and in and by said Act of Congress it was further provided, among other things, that the Leavenworth, Pawnee and Western Railroad

Company of Kansas, a corporation previously organized and then existing under and by virtue of an Act of the Governor and Legislative Assembly of the Territory of Kansas, was authorized to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River on the south side thereof, so as to connect with the aforesaid line of The Union Pacific Railroad Company at its initial point on the
27 100th meridian of longitude west of Greenwich as hereinabove stated, upon the same terms and conditions in all respects as were provided in said Act for the construction of the railroad and telegraph line first above mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; that the name of said Company last named was in the year 1863 duly and pursuant to lawful authority changed from the Leavenworth, Pawnee & Western Railroad Company to Union Pacific Railway Company, Eastern Division; that by Act of the Congress of the United States, approved July 2nd, A. D. 1864, and entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1st, 1862," it was provided, among other things, that any company authorized by said Act, or the Act amended thereby, to construct its railroad and telegraph line from the Missouri River to the initial point aforesaid on the 100th meridian, might construct its railroad and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route
28 hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of said act and of the act amended thereby.

That by Act of the Congress of the United States, approved July 3rd, 1866, and entitled "An Act to amend an Act entitled 'An Act to amend an Act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, 1862,' approved July 2nd, 1864," it was provided, among other things, that said The Union Pacific Railway Company, Eastern Division, should connect their line of railroad and telegraph with The Union Pacific Railroad, authorized by said Act of July 1st, 1862, and the Acts amendatory thereof but not at a point more than fifty (50) miles west-

wardly from the meridian of Denver in Colorado, and that the name of said Union Pacific Railway Company, Eastern Division, was in the year 1869, under and by virtue of an Act of Congress of the United States, approved March 3rd of that year, changed to "Kansas Pacific Railway Company."

And further answering said bill of complaint, this defendant avers that at the time of the passage of each and all of said Acts of Congress, save and except said Act of 1869 last hereinabove referred to, the lands described in the bill of com-
29 plaint herein were public lands of the United States; that the grant of right of way conferred by said Act of July 1st, 1862, and the various Acts amendatory thereof and supplemental thereto, which are hereinabove referred to, was a present absolute grant and took effect immediately upon the passage of the Act of Congress; that pursuant to said Act of July 1st, 1862, and the several Acts amendatory thereof and supplemental thereto, which have been hereinabove referred to, said the Leavenworth, Pawnee & Western Railroad Company, said Union Pacific Railway Company, Eastern Division, and said Kansas Pacific Railway Company complied with all of the terms and conditions of said several Acts of Congress and constructed said line of railroad from the point on the Missouri River hereinabove referred to, through what are now the States of Kansas and Colorado, to the city of Denver in Colorado, and by virtue of an arrangement with The Denver Pacific Railway & Telegraph Company, and under and in pursuance of authority conferred by an Act of Congress, approved March 3rd, 1869, from Denver in Colorado, to a connection with the main line of said Union Pacific Railroad Company at Cheyenne in Wyoming; that thereafter, and under and by virtue of authority conferred by said Act of Congress, approved July 1st, 1862, and the various Acts amendatory thereof and supplemental thereto, which are hereinabove referred to, Articles of Union and Consolidation were entered into between the Union Pacific
30 Railroad Company, the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, said Articles being executed on, to-wit, the 24th day of January, 1880, and being filed in the Department of the Interior pursuant to said Acts of Congress on, to-wit, the 26th day of January, 1880; that in and by said Articles the several organizations of the corporations signing the same were consolidated into one company under the name of "The Union Pacific Railway Company," which said consolidated Company thereupon succeeded to, became possessed of and entitled to re-

ceive from the Government of the United States all and singular the grants, benefits and immunities which the aforesaid three (3) companies respectively at the date of said consolidation were or might be entitled to under said several Acts of Congress, and each of the companies entering into said consolidation did thereby assign, transfer, set over and convey unto said The Union Pacific Railway Company, the consolidated corporation, all the property, real, personal and mixed, or each of said companies.

That the line of railroad constructed under and in pursuance of said Act of Congress, approved July 1st, 1862, and the Acts amendatory thereof and supplemental thereto, known as Union Pacific Railway Company, Eastern Division, afterwards Kansas Pacific Railway Company, and later, by consolida-
31 tion, passing to said The Union Pacific Railway Company, crossed said tract of land described in the bill of complaint herein; that by virtue of said Acts of Congress, a strip of land was granted for a right of way to the extent of two hundred (200) feet on each side of the center line of the main track of said railway as it crossed said lands described in the bill of complaint herein, and said grant preceded and took effect before the initiation of the title to the remaining portion of said lands under which the plaintiffs claim; that said The Leavenworth, Pawnee & Western Railway Company, the Union Pacific Railway Company, Eastern Division, the Kansas Pacific Railway Company and the Union Pacific Railway Company possessed and enjoyed continuously said railroad and said strip of land four hundred (400) feet in width for a right of way therefor from the time of the passage of said acts and the construction of said railway up to and including October 13th, 1893; that on the date last mentioned, in a proceeding then pending in the circuit court of the United States for the district of Colorado, and entitled "Oliver Ames, Second, and others v. The Union Pacific Railway Company," receivers were appointed for the property of said The Union Pacific Railway Company, including said line of track and said strip of ground for a right of way four hundred (400) feet in width through the lands described in the bill of complaint herein; and that thereafter said Receivers possessed and enjoyed said
32 railroad track and said strip of land four hundred (400) feet in width for a right of way until the commencement of an action in said circuit court of the United States for the district of Colorado, to foreclose certain mortgages theretofore given, and covering all of the property of said the Kansas Pacific Railway Company and of said The Union Pacific Railway Company, whereupon receivers in said foreclosure proceedings

were duly appointed by the circuit court of the United States for the district of Colorado, who thereupon took possession of said track and said four hundred (400) foot strip through the lands described in the bill of complaint herein, and thereafter possessed and enjoyed the same until by decree of foreclosure, duly made and entered by foreclosure sale and purchase thereat, and by subsequent mesne conveyances, the property of said the Kansas Pacific Railway Company and of said The Union Pacific Railway Company passed to defendant herein, since which time this defendant has continuously owned, occupied, possessed and enjoyed said railroad track and said strip of ground four hundred (400) in width through, over and across the tract of land described in the bill of complaint herein.

And defendant further says that by virtue of said Act of Congress, approved July 1st, 1862, and the various Acts amendatory thereof and supplemental thereto, which are hereinabove referred to, and by virtue of the various consolidations,
33 conveyances, foreclosures, sales and deeds hereinabove more particularly described, it is the owner in fee, and that it was at the time of the commencement of these proceedings, for a long time prior thereto had been, ever since has been, and is now such owner and in exclusive possession of a strip of ground through the lands described in the bill of complaint, said strip being four hundred (400) feet in width and lying two hundred (200) feet on each side of the center line of the main track of this defendant through said lands described in the bill of complaint.

And defendant further says that the plaintiffs herein have not, nor has either of them, nor have they, or either of them, ever had any right, title or interest whatsoever in said described strip, or any part thereof.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this: that there is any other matter, cause or thing in the said plaintiffs' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove,

as this honorable court shall direct, and humbly prays to
34 be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

UNION PACIFIC RAILROAD COMPANY,
Defendant,
By Clayton C. Dorsey,
General Attorney.

CLAYTON C. DORSEY,
WILLIAM V. HODGES,
Solicitors.

State of Colorado,
City and County of Denver—ss.

Clayton C. Dorsey, makes solemn oath and says: I am General Attorney for the above-named defendant, Union Pacific Railroad Company; that said defendant is a corporation, and for that reason I make this verification on its behalf; that I am familiar with the facts upon which said answer is based, having examined the various Acts of Congress therein referred to, and the other documents and records relative to said title; that so much of the foregoing answer as concerns the acts and deeds of Union Pacific Railroad Company is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

CLAYTON C. DORSEY.

Subscribed and sworn to before me this eleventh day of January, A. D. 1907.
My Commission expires October 16" 1909.

(Notarial Seal) EWALD W. HEINEMANN,
Notary Public.

35 (Endorsed) In Equity. No. 4953. In the Circuit Court of the U. S. for District of Colorado. Thomas B. Stuart and Charles A. Murray, Plaintiffs, vs. Union Pacific Railroad Co., The Kansas Pac. Railway Co. and The Colo. Eastern R. R. Co., Defendants. Answer of Union Pacific R. R. Co. Filed Jan. 14, 1907, Charles W. Bishop Clerk. Dorsey & Hodges, Atty. for Deft. U. P. R. R, Co.

In the Circuit Court of the United States, For the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Plaintiffs,
No. 4590. vs.
The Union Pacific Railroad Company, The Kansas Pacific Railway Company and the Colorado Eastern Railroad Com-Company, Defendants.

Demurrer to Answer of the Union Pacific Railroad Company.

The plaintiffs, Thomas B. Stuart and Charles A. Murray, by protestation, not confessing or acknowledging all or any of the matters and things in the said answer to be true in such manner and form as are therein set forth and alleged, demur thereto and for cause of demurrer show.

I. To the jurisdiction of this court.

(a). It is shown by the said answer that there is and was no separable controversy, and this court cannot longer continue its jurisdiction in regard to said controversy, but should
36 remand the same to the court from which it came. The said answer shows conclusively that this defendant is claiming under and by and through the Kansas Pacific Railroad Company, and that company and the controversy in relation thereto remains in the state court.

II. That the defendant has not the legal capacity—or standing to present the matters and things set forth in its answer.

III. The plaintiffs further demur to the substance of the answer as being wholly insufficient, and particularly in the following respects.

(a). The said answer does not state facts sufficient to constitute a defense to the action of the plaintiff.

(b). The matters and things set forth in said answer are not sufficient in law or equity or constitute a defense.

(c). There is no allegation as to value of the subject matter, the answer does not embrace the whole controversy, there are no sufficient parties before this court to permit of its adjudicating the matters that are presented by the defendant, and the record shows that there is a suit pending in the state court where proper jurisdiction rests over the defendant and the matters in controversy.

(d). That the defendant's statements and conclusions as to each of the acts of Congress referred to are wholly untenable.

That the facts stated by the defendant fail to show that
37 either the defendant or any person or company under which it claims ever acquired any right or any title to

the land described in the complaint or any portion thereof, and especially the four hundred feet in width, across said land, claimed in said answer. That there is nothing in said acts of Congress or either of them, that would vest in the defendant or any company under which it claims, any right or title to any right of way prior to the definite location of the road and the filing of proper plats, by which such right of way could be identified. That the answer admits that the United States conveyed all of said land by its patent to Erastus E. Eastman, making no exception as to any right of way to any company, long prior to any time when the defendant or any company under which it claims could have had any right or title in said lands. That said acts of Congress do not purport to grant a right of way except in public lands, and lands which were such at the time such right of way was definitely located. That there is nothing in either of said acts that would justify the defendant or any of the companies under which it claims, in claiming the right to disregard the claims of private ownership, or that would justify the defendant or any company under which it claims, in asserting title to lands that had been patented to private citizens by the United States.

38 IV. The plaintiffs further demur to said answer, and allege that it is insufficient in matter of form in the following respects among others:

(a) That none of the essential facts are alleged positively.

(b) That there is great uncertainty in each and all the matters and things attempted to be stated by the defendant.

(c) That the said answer does not offer to do equity.

J. C. HELM and
STUART & MURRAY,
Attorneys for plaintiffs.

District of Colorado,
City & County of Denver—ss.

Thomas B. Stuart and Charles A. Murray each make solemn oath and say. That they are the plaintiffs in this action and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

THOMAS B. STUART,
CHARLES A. MURRAY.

Subscribed & sworn to before me this 4th day of Feb., 1907.
My Com. expires Jan. 30, 1910.
(Notarial Seal)

J. WARNER MILLS,
Notary Public.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

J. C. HELM,
STUART & MURRAY,
Attorneys for Plaintiff.

Endorsed: No. 4953. In the Circuit Court of the
39 United States, for the District of Colorado. Thomas B. Stuart and Charles A. Murray, vs. The Union Pacific Railroad Company, The Kansas Pacific Railway Company and the Colorado Eastern Railroad Company. Demurrer to Answer of The Union Pacific Railroad Company. Filed Feb. 4, 1907. Charles W. Bishop, Clerk. J. C. Helm & Stuart & Murray, Continental Building, Denver, Colo., Telephone 565, Attorneys for Plaintiffs.

Eighty-first Day, May Term. Wednesday, September 25th, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of May, A. D. 1907.

Thomas B. Stuart and Charles A. Murray,
4953. vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company.

In Chancery.

Bill to quiet title.

This cause coming on now to be heard upon the application of the complainants for leave to file herein an amendment to the bill of complaint, is argued by counsel, Thomas B. Stuart, Esquire, appearing as solicitor for the complainants, and Clayton C. Dorsey, Esquire, appearing as solicitor for the respondents. And thereupon, on consideration thereof;

It is ordered by the court that the complainants may file herein an amendment to their bill of complaint as they
40 shall be advised, instanter, which is accordingly done.

It is further ordered by the court that the respondents plead to said amendment as they shall be advised by or before the November, 1907, rule day.

In the Circuit Court of the United States, for the District of Colorado.

Thomas B. Stuart, Charles A. Murray, Plaintiffs,
No. 4590. vs. In Equity.
The Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Eastern Colorado Railroad Company, Defendants.

Amendment to Complaint.

Come now the plaintiffs and with the consent of the court first had and obtained, make and file the following amendment to and of their complaint; the same to be substituted for and to take the place of the second paragraph thereof, namely:

2nd. That said land was in accordance with, and under, and as provided for in, the land laws of the United States, settled upon and a declaratory statement of entry filed thereon, in the proper land office of the United States at Denver, Colorado, by one Erastus E. Eastman, on the 18th day of June, 1866, the said Eastman paying at said time to the United
41 States all filing and preliminary entry fees provided for by law. That later, in pursuance of his rights so initiated, the said land was entered by the said Erastus E. Eastman, and was by him purchased from the United States and a certificate of purchase, or receiver's receipt issued to him therefor from the United States on the 2nd day of January, 1867. That said certificate or receiver's receipt for the purchase money was duly recorded in the proper records of Arapahoe County, Colorado, on the 12th day of July, 1867. That afterward, in accordance with the entry and purchase aforesaid and in pursuance thereof the United States, on October 1st, 1867, issued its patent to said land to the said Erastus E. Eastman and said patent was afterward recorded in the proper records of Arapahoe county, Colorado.

J. C. HELM and
STUART & MURRAY,
Attorneys for plaintiffs.

United States of America,
State of Colorado.

I, Thomas B. Stuart, one of the plaintiffs in the above entitled action, on oath say that the matters and things set forth in the foregoing amendment are true as I verily believe. That I also believe that the fact as to when plaintiffs title was initiated is proper and necessary to be stated in order to make more clear and explicit the portion of said complaint so amended.

THOMAS B. STUART.

42 Subscribed in my presence and sworn to before me this 14 day of September, 1907, by Thomas B. Stuart.

(Notarial Seal) JOHN H. GABRIEL,
Notary Public.

Endorsed: No. 4953. In the Circuit Court of the United States. Thomas B. Stuart, Charles A. Murray, Plaintiffs, vs. The Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Eastern Colorado Railroad Company, Defendants. Amendment to Bill of Complaint. Filed Sep. 25, 1907, Charles W. Bishop, Clerk. Stuart & Murray, Continental Building, Denver, Colo. Telephone 565, Attorneys for .....

In the Circuit Court of the United States for the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4590. vs. In Equity.
Union Pacific Railroad Company, et al., Respondents.

Exceptions of Respondent Union Pacific Railroad Company to part of the amendment to the Bill of Complaint.

Now comes the above named respondent, Union Pacific Railroad Company, by its solicitors, and excepts to the following specific portion of the amendment to the bill of complaint, which amendment was filed herein on September 25th, 1907:

43 On the 18th day of June, 1866, the said Eastman paying at said time to the United States all filing and entry fees provided for by law;

said excerpt of said amendment to said bill of complaint commencing in line 5 of the amended second paragraph of said bill; and for grounds of such exception this respondent shows that said portion of said amended second paragraph of said bill is impertinent, imperfect, insufficient and irrelevant, and not proper to be answered unto by this respondent, and respondent humbly insists that the said impertinent matter ought to be expunged from said amendment to said bill of complaint.

C. C. DORSEY,
W. V. HODGES,
Solicitors for Respondent, Union Pacific Railroad Company.

Endorsed: 4953. In Equity. In the Circuit Court of the U. S. for Dist. of Colo. Thomas B. Stuart and Charles A. Mur-

ray, Complainants, vs. Union Pacific Railroad Co., et al., Respondents. Exceptions of Respondent U. P. R. R. Co. to part of amendment to bill of complaint. Filed Sep. 25, 1907, Charles W. Bishop, Clerk. Dorsey & Hodges, Attorneys for Respondent U. P. R. R. Co.

Eighty-sixth Day, May term. Tuesday, October 1st, A. D. 1907.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of May, A. D. 1907.

44 Thomas B. Stuart and Charles A. Murray,
4953. vs.
Union Pacific Railroad Company, et al.

In Chancery. Bill to quiet title.

This cause coming on now to be heard, Thomas B. Stuart, Esquire, appearing as solicitor for the complainant, and Clayton C. Dorsey, Esquire, appearing as solicitor for the respondent Union Pacific Railroad Company. And thereupon, the complainants say that they will and do hereby withdraw the demurrer heretofore filed by them to the answer of the respondent Union Pacific Railroad Company.

And thereupon, it is ordered by the court that the complainants reply to the answer of the respondent Union Pacific Railroad Company herein within ten (10) days from this day as they shall be advised.

And the exceptions of the respondent Union Pacific Railroad Company to the amendment to the bill of complaint herein are argued by counsel. And thereupon, on consideration thereof, it is ordered by the court that the said exceptions be, and the same are hereby overruled, and that the respondent Union Pacific Railroad Company may answer the amendment to the bill of complaint herein within five (5) days from this day, as it shall be advised.

In the Circuit Court of the United States

45 For the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Complainants,
vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company, et al., Defendants.

Answer of Union Pacific Railroad Company to Amendment to Complaint.

The defendant, Union Pacific Railroad Company, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the amendment to the bill of complaint herein contained, for answer to such amendment, being amended paragraph 2 of said bill of complaint, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

Admits that said land was, in accordance with and under acts provided for in the Land Laws of the United States, to-wit, the Pre-emption Law, settled upon and a declaratory statement of entry filed thereon in the Land Office of the United States at Denver, Colorado, by one Erastus E. Eastman on the 18th day of June, 1866; and avers that said settlement was made and said declaratory statement filed under the Pre-emption Laws of the United States as they then existed.

46 Admits that said Eastman paid at said time the filing and preliminary fees required, and avers that said filing and preliminary fees so paid by said Eastman amounted to the sum of three ($3.00) dollars for filing said declaratory statement and no more. Admits that later, and in pursuance of said declaratory statement, the said land was entered by said Erastus E. Eastman, and was by him purchased from the United States, and a certificate of purchase or receiver's receipt issued to him therefor from the United States on the 2nd day of January, 1867; and admits that thereafter, in pursuance of said entry, patent of the United States was issued to said Eastman on October 1st, 1867; but defendant avers, as it has heretofore averred, that said patent was issued and taken, and said land was acquired by said Eastman subject to the grant of a right-of-way four hundred (400) feet in width, which had theretofore been made to the predecessors in title of this defendant as hereinbefore and in the previous answer stated.

Wherefore, defendant prays, as it has heretofore prayed, that it may be hence dismissed with its costs.

UNION PACIFIC RAILROAD COMPANY,
By C. C. Dorsey, Gen'l. Attorney.
C. C, DORSEY,
W. V. HODGES,
Solicitors.

State of Colorado,
City and County of Denver—ss.

47 Clayton C. Dorsey, makes solemn oath and says: I am general attorney for the above named defendant, Union Pacific Railroad Company; that said defendant is a corporation, and for that reason I make this verification on its behalf; that I am familiar with the facts upon which said answer is based, having examined the various Acts of Congress therein referred to, and the other documents and records relative to said titles; that so much of the foregoing answer as concerns the acts and deeds of Union Pacific Railroad Company is true to the best of my knowledge, and so much thereof as concerns the acts and deeds of any other person or persons I believe to be true.

CLAYTON C. DORSEY.

Subscribed and sworn to before me this 2nd day of October, A. D. 1907. My commission expires October 16" 1909.

(Notarial Seal) EWALD W. HEINEMANN,
Notary public.

Endorsed: No. 4953. In the Circuit Court of U. S. for Dist. of Colo. Thomas B. Stuart and Charles A. Murray, Complainants, vs. Union Pacific R. R. Co., The Kansas Pac. Ry. Co., et al., Defendants. Answer of U. P. R. R. Co. to amendment to Bill of Complaint. Filed Oct. 3, 1907. Charles W. Bishop, Clerk. Dorsey & Hodges, Attorneys for Deft. U. P. R. R. Co.

In the Circuit Court of the United States in and for the District of Colorado.

48 Thomas B. Stuart, Charles A. Murray, Plaintiffs,
No. ..... vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, Defendants.

Replication to the Answer of Union Pacific Railroad Company.

Replication of the above named plaintiffs to the answer of Union Pacific Railroad Company, Defendant.

These replicants, Thomas B. Stuart and Charles A. Murray, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Union Pacific Railroad Company for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to

be answered unto by the said defendant, and that the answer of the said defendant is uncertain, untrue, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver,
49 maintain and prove as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

J. C. HELM,
STUART & MURRAY,
Solicitors for complainant.

State of Colorado,
City and County of Denver—ss.

Thomas B. Stuart and Charles A. Murray, the plaintiffs herein, each for himself and not one for the other, make solemn oath and says: That the matters and things set forth in the foregoing application are true as they and each of them verily believe.

THOMAS B. STUART,
CHARLES A. MURRAY.

Subscribed and sworn to before me this 8th day of October, A. D. 1907, by Thomas B. Stuart and Charles A. Murray. My commission expires May 15, 1910.

(Notarial Seal) JOHN H. GABRIEL,
Notary Public.

Endorsed: No. 4953. In the Circuit Court of the United States. Thomas B. Stuart, Charles A. Murray, Plaintiffs, vs. Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company, Defendants. Replication to the Answer of Union Pacific Railroad Company. Filed Oct. 9, 1907. Charles W. Bishop, Clerk. Stuart & Murray, 710 Kittredge Bldg., Denver, Colo., Telephone 565, Attorneys for Plaintiffs.

50 Forty-Eighth Day, November Term. Wednesday, January 8th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fifth day of November, A. D. 1907.

Thomas B. Stuart et al,
4953. vs.
Union Pacific Railroad Company et al.

In Chancery Bill to quiet title.

This cause coming on now to be heard, Charles A. Murray, Esquire, appearing as solicitor for the complainants and Clayton C. Dorsey, Esquire, appearing as solicitor for the respondents, and thereupon on motion of complainants;

It is ordered by the court that the time for taking testimony herein be, and the same is hereby, enlarged and extended to and including ninety (90) days from this day.

Eighty-Third Day, November Term. Friday, March 20th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the twenty-fifth day of February, A. D. 1908.

Thomas B. Stuart and Charles A. Murray,
4953. vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Colorado Eastern Railroad Company.

In Chancery, Bill to quiet title.

This cause coming on now to be heard, Charles A. Mur-
51 ray, Esquire, appearing as solicitor for the complainants, and Clayton C. Dorsey, Esquire, appearing as solicitor for the respondents. And thereupon, on motion of complainants;

It is ordered by the court that the time heretofore allowed for taking testimony herein be, and the same is hereby, enlarged and extended for sixty (60) days from this day.

It is further ordered by the court that the complainants complete the taking of testimony on their behalf within twenty (20) days from this day; that the respondents complete the taking of testimony on their behalf within thirty (30) days thereafter, and that the complainants complete the taking of testimony on their behalf in rebuttal within ten (10) days after the respondents shall have completed the taking of testimony on their behalf.

United States of America,
District of Colorado—ss.

In the Circuit Court,

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4953. vs. In Equity
Union Pacific Railroad Company et al, Respondents.

Testimony on behalf of Complainants.

Be It Remembered, that on the 6th day of April, A. D. 1908, in pursuance of the mutual agreement of the parties
52 hereto, the parties to the above entitled cause appeared before me, Sanford C. Hinsdale, an Examiner in Chancery of the Circuit Court of the United States for the District of Colorado, at my office, Room 803 Continental Building, in the city of Denver, state of Colorado; the complainants in said case by Messrs. Stuart and Murray, their solicitors, and the respondent Union Pacific Railroad Company, by C. C. Dorsey, Esq., its solicitor; and on the said 6th day of April, 1908, and on the succeeding days to which the taking of evidence herein was successively adjourned as hereinafter stated, came also before me Thomas B. Stuart, Charles A. Murray and Charles D. Ford, to testify as witnesses on behalf of the complainants; and the said witnesses, having been by me first duly sworn according to law, respectively, to testify to the truth, the whole truth and nothing but the truth in the matter or suit in controversy as aforesaid, were severally examined before me on oral interrogatories propounded to them, respectively, by counsel, as in their several depositions fully appears; that is to say:

Thomas B. Stuart, one of the complainants, produced as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Charles A. Murray:

Q. Are you one of the plaintiffs in this action, and if
53 so, give your name, age, place of residence and occupation.

A. I am one of the plaintiffs; my name is Thomas B. Stuart; age, sixty-two; residence, City of Denver; occupation, lawyer.

Q. You may now answer all you may know concerning the title of the plaintiffs in this action to the land in controversy, attaching as exhibits to your answer, numbering them, deeds, patents, etc.

A. I make Exhibit 2, certificate of location by Erastus E. Eastman of the land in controversy, and an assignment thereof to John W. Iliff, which is duly certified. I attach as Exhibit 3 to this my deposition, certified copy of warranty deed from Erastus E. Eastman to John W. Iliff, for the land in controversy. I attach as Exhibit 4 to this my deposition, certified copy of United States patent to the land in controversy, to Erastus E. Eastman. I attach as Exhibit 5 to this my deposition, certified copy of lis pendens filed in the office of the Recorder of Deeds in former Arapahoe county, at present city and

county of Denver, in the case of Andy M. Adams vs. Elizabeth Warren et al, the same relating to the lands in controversy.

Mr. Dorsey: Defendant Union Pacific Railroad Company objects to Exhibit 5, as being immaterial and irrelevant.

A. (continued) I attach to my deposition as Exhibit 6, certified copy of the final decree in the case of Adams vs. Warren, in relation to the lands in controversy, this being the
54 decree that followed the lis pendens, Exhibit No. 5.

Mr. Dorsey: Exhibit 6 is objected to by Union Pacific Railroad Company as immaterial and irrelevant.

A. (continued) I make a part of my deposition, as Exhibit 7, the opinion of the Supreme Court of Colorado in the case of Warren, et al, appellants, vs. Adams, appellee, to be found in 19th Colorado Reports (Supreme Court Reports), beginning at page 515, and extending to and including page 529. I ask that I may be allowed to introduce such report upon the hearing of this case without making a copy of this publication authorized by law.

Mr. Dorsey: We have no objection to Exhibit 7 on the ground of not having at this time offered a certified copy of the opinion, but we object to the opinion as being irrelevant and immaterial.

A. (continued) I attach to my deposition, as Exhibit 8, a certified copy of the steps taken in the accounting for taxes as provided for in the opinion of the Supreme Court in the case just referred to, being the taxes paid by Illif upon this land. The matter now offered came up before Calvin Butler, one of the Judges of the district court, wherein said case had been pending, and the court to which said case was returned for the accounting.

Mr. Dorsey: Exhibit 8 is objected to by Union Pacific Railroad Company as being immaterial and irrelevant.

A. (continued) I attach Exhibit 9, to this my deposition, the petition of Thomas B. Stuart and Charles A. Murray,
55 filed in said tax accounting proceeding.

Mr. Dorsey: Union Pacific Railroad Company objects to Exhibit 9 as being immaterial and irrelevant.

A. (continued) I attach to this my deposition, Exhibit 10, the judgment of the court upon the petition of Stuart & Murray aforesaid, the judgment being signed "By the court, John I. Mullins, Judge."

Mr. Dorsey: Union Pacific Railroad Company objects to Exhibit 10 as immaterial and irrelevant.

A. (continued) Still later in date than any of the exhibits offered, one of the parties who had become possessed of an interest in the land in controversy, by virtue of a deed from the Adams' heirs, his name being George W. Harrison, brought an action against all the rest of the parties, shown to be interested in said land, for a partition of these lands, and Thomas B. Stuart and Charles A. Murray were made defendants with the rest of the parties claiming interest. Stuart & Murray filed a cross bill in that case, claiming that the plaintiff had no interest whatever in said land, and they asked that the title be quieted as against the plaintiff and all the remaining defendants, on account of their having been subrogated to the rights of the several parties by the payment of taxes, amounting at that time to about $3,800, as shown by the exhibits heretofore introduced. Upon the trial of that cause the court found for Thomas B. Stuart and Charles A. Murray, upon their cross bill as
56 against the plaintiff and all the remaining defendants, and quieted their title. This action was tried in the district court for the city and county of Denver, formerly Arapahoe county, and was appealed by the plaintiff in that action to the supreme court and that appeal is still pending.

Mr. Dorsey: The defendant, Union Pacific Railroad Company moves to strike out all that has been testified to by Judge Stuart in respect to the subsequent action mentioned above and the cross bill by Stuart & Murray, and the contents of the pleadings and the object of said action and the results thereof, for the reason that the same is not the best evidence; that it does not appear that Union Pacific Railroad Company or any of its predecessors in title, was a party to said proceeding, or that any relief was granted or attempted to be granted therein as against Union Pacific Railroad Company or any of its predecessors in title; and for the reason that said testimony is incompetent, immaterial and irrelevant.

Mr. Stuart: I will ask you to waive that objection, as not being the best evidence.

Mr. Dorsey: I will simply decline to do so at this time, but I think I will do so later, in all probability.

Mr. Stuart: I will therefore leave space for the papers as Exhibit 11, in relation to the matters just testified about, should it become necessary to file the papers.

Mr. Dorsey: Yes, and the Union Pacific would reserve the right to object to those papers when they are offered, if offered.

A. (continued) Yes. I make as Exhibit 12, to my deposition, copy of a special warranty deed from Andy M. Adams to C. O. Atkins, trustee, covering the undivided half of the
57 land in controversy.

Mr. Dorsey: Exhibit 12 is objected to as immaterial and irrelevant.

A. (continued) I attach to this my deposition, as Exhibit 13, certified copy of special warranty deed from C. O. Atkins, trustee, to Thomas B. Stuart and Charles A. Murray, for an undivided interest in the land in controversy, the same being in part execution of the trust imposed upon him by the deed referrd to as Exhibit 12.

Mr. Dorsey: Objected to as immaterial and irrelevant; also because it conveys in part to one A. M. Andrews, who is not a party to this proceeding.

A. (continued) I would add, then, to my answer, that A. M. Andrews was a party to the proceeding in Exhibit No. 11, and all other persons owning interests upon either side of the title were parties to that proceeding, and the title quieted in Stuart and Murray as against all of them. I do not mean to refer to the Union Pacific or any of its predecessors, but only to those that claim title either through Illif or through Adams. I make a part of this my deposition, as Exhibit 14, a release, assignment of judgment, and deed, to all the lands in controversy, from John W. Iliff's heirs to Thomas B. Stuart and Charles A. Murray. I hand you the original for examination, and a copy of it, and ask to withdraw the original and leave the copy, as the original will be necessary in other proceedings, in reference to our title. I haven't it here; it is being recorded; I will produce it later.

Mr. Dorsey: We will reserve our objection until the
58 instrument itself is here.

Mr. Stuart: Yes, that will be all right.

Q. You may now state how long you have personally been acquainted with this land, the character of it, as to whether being cultivated, fenced or not, with such acts of ownership and possession as you may be acquainted with, in the plaintiffs or any of their grantors in title.

A. I cannot give the exact date, but I think I was first upon these lands in the year 1887, and have been upon and over said lands very many times since that period. The record title at

that time rested in John W. Iliff, as shown by the Exhibits, while Andy M. Adams claimed to be the real party in interest, and that Iliff held the title simply as trustee for him. Iliff had paid all the taxes on the land from the date of entry, in 1866 up to the accounting as is shown by Exhibits heretofore introduced.

Mr. Dorsey: I think you are stating a legal conclusion, that Iliff had paid all the taxes.

Mr. Stuart: That was proven, and in the accounting he introduced the Treasurer and the Treasurer's books; they had lost all the receipts, and that is how it was proved to be $3,800.

Mr. Dorsey: I will move, therefore, to strike out the last statement of the witness, John W. Iliff having paid all of the taxes upon the land for the reason it is not the best evidence and a mere conclusion of the witness; also that it is immaterial and irrelevant.

A. (continued) I cannot introduce any better evidence of the statement that Iliff paid all these taxes; that is to
59 say, I cannot introduce the tax receipts, for we have tried to do so. In the accounting that was had of the taxes paid by Iliff, the Iliff heirs established the amount by sending a party to examine the County Treasurer's books, and estimated the most of them in that way. As the taxes were paid from 1866 down to the date of the accounting—the tax receipts had been lost, so that the Iliff heirs could not introduce them—the court had to arrive at the amount in that way, and it was found to be in the neighborhood of some $3,800, which Stuart and Murray paid, as is shown by the Exhibits that have been introduced in evidence.

Mr. Dorsey: I move to strike out the statements of the witness subsequent to the last motion, for the reason that the same state a conclusion of the witness, are not the best evidence, and are immaterial and irrelevant.

A. (continued) The lands have never been fenced, but have at all times been wild and not under cultivation. In 1887 they had recently been surveyed by the Iliff heirs and good, solid well marked posts put up at all corners. The Adams' interests also surveyed the lands about that time, verifying the surveys made by the Iliffs and then resurveyed at different times after that, aiming to get at specific interests that Adams had contracted, or was about to contract, to convey. In surveying these lands both parties passed at will all over the entire lands, pay-

ing no attention whatever to a track of the Kansas Pacific or other railroad, and surveyed in said track or tracks with the rest of the land. There never has been any plat filed by the Kansas Pacific or any other railroad claiming any interest in these lands, and no conveyance of any kind appears upon the records, which I have examined over and over again, to the Kansas Pacific or other railroad company for any parts or portions of these lands.

Mr. Dorsey: I move to strike out the statement of the witness as to there being no plats filed and no conveyances of record to or on behalf of the Kansas Pacific Railway Company or any other railroad company, for the reason that it is not the best evidence; that it is immaterial and irrelevant and is a conclusion of the witness.

A. (continued) I have examined time and again and caused to be examined at different times by the Register and Receiver of the Land Office in Denver, for any map or plat that had ever been filed or might be in existence, of any right of way for the Kansas Pacific Railway Company or any other railroad company, to any right of way or interest over any part or portion of these lands; I could never find anything of the kind and they could never find anything of the kind.

Mr. Dorsey: As to what has been said by the witness since the last motion, defendant Union Pacific Railroad Company, moves to strike out all in respect to "they could never find anything of the kind" as a conclusion, and not the best evidence; and moves to strike out all of the statement of the witness since the last preceding motion, as immaterial and irrelevant.

61 A. (continued) I have examined the records of the courts in this, the county in which said lands lie, to see if any proceeding had ever been commenced by the Kansas Pacific Railway Company or any other railway company to condemn the right of way across said lands and have not found any such proceeding.

Mr. Dorsey: I will move to strike out the statements of the witness in regard to his search, in regard to the condemnation proceedings as immaterial and irrelevant.

A. (continued) The complainants, Stuart and Murray, have applied directly to the present defendant Company, time and again, to ascertain what rights they claimed in said lands, to right of way or otherwise, and have never received any answer embracing any claim to any right of way, or specifying any claim to any right of way until the answer was filed in this case

under which they claimed right of way under several Acts of Congress.

Mr. Dorsey: Defendant, Union Pacific Railroad Company, moves to strike out all that the witness has stated, subsequent to the last motion, for the reason that the same is irrelevant and immaterial. Defendant, Union Pacific Railroad Company further moves to strike out all of the answer to the preceding question, for the reason that it is immaterial and irrelevant.

Q. You have stated that none of said land had ever been cultivated or fenced. Does this statement apply to any claim for right of way made by the defendants herein? State the nature of the defendant's occupancy, so far as you have seen it.

A. The statement applies to any claim of right of way
62 by the defendant herein, although I may say that I have not seen the land within the last two or three years. The defendant's track and occupancy of the land simply embraces a single track of standard gauge railroad over comparatively level land, and the owners of the entire property as given in the complaint, have used the same liberty in crossing over the defendant's track at any place they saw proper, that the defendants have in crossing over the lands. My attention has been called by Mr. Murray to the fact that at one time, some distance from the track—and I cannot say whether it is within the right of way, even, claimed by the defendant,—a snow-brake was erected, and there was only a few rods of this, constructed in the ordinary way. Otherwise I know of no acts or claims of ownership on the part of the defendant than as here stated.

Q. Can you give the full amount paid by the plaintiffs herein as taxes on said land, and the dates between which they have paid the taxes; if so, give them.

Mr. Dorsey: I will object to the question, because it is immaterial and irrelevant and not the best evidence; calls for a conclusion.

A. I cannot give the full amount personally, as these taxes were paid by my partner, Mr. Murray. The Exhibits introduced in evidence of the accounting show only what was paid to the Iliff heirs, and that commenced with the date of entry of the land and ran up to the time of the accounting. Stuart
63 and Murray have paid taxes since time up to and including the present year.

Q. Has any reduction ever been made in any of these tax payments on account of any ownership of any right-of way of the 400 feet in width or other widths across said lands belonging to the Kansas Pacific Railway Company herein?

Mr. Dorsey: Objected to by the defendant Union Pacific Railroad Company, for the reason that the witness's statement would be mere hearsay and not the best evidence; also because a mere conclusion is called for; also because the matter inquired about is immaterial and irrelevant.

A. No; if the Kansas Pacific Railway Company or the present defendant own any of said lands by right of way, Stuart and Murray have paid all the taxes on it from the year 1866, up to and including the present year—the first half of the year 1907; that paid by the Iliffs being repaid them directly by the present plaintiffs.

Q. What do you know, if anything, about any application being made to Union Pacific Railroad Company by and on behalf of Andy M. Adams to settle the matters as regards any claim that the Union Pacific might have as to right of way; and any conversation that may have been had with Mr. H. M. Orahood, one of the then General Attorneys of said road in Denver.

Mr. Dorsey: Defendant Union Pacific Railroad Company objects to the question as to being incompetent, irrelevant and immaterial; any conversation with Mr. Orahood would be mere hearsay and would not in any degree be binding upon present Union Pacific Railroad Company.

64 A. I know that we applied to and had frequent conversations with the Union Pacific through their general attorneys here at Denver, including Mr. Orahood, in relation to that right of way; the Union Pacific kept said matter under consideration for several months, and we thought we were going to be able to adjust and settle matters. I don't know what Mr. Orahood's last statement was in regard to the matter, that having been made to Mr. Murray, my partner.

Mr. Dorsey: Defendant Union Pacific Railroad Company moves to strike out the statements of the witness as to negotiations or conversations had with H. M. Orahood or other attorneys representing the Railroad Company, for the reason that they are mere hearsay, and not binding upon defendant and not admissible, since they apparently were mere negotiations for a settlement and a compromise; nor at all admissible as an admission or otherwise on the part of this defendant; and incompetent, immaterial and irrelevant.

Cross Examination

By Mr. Dorsey:

Q. Judge Stuart, in reference to the matter which you denominated Exhibit 11, you made a statement as to some proceeding in court involving certain parties having or claiming

interest in the land, in which proceeding, you stated, Stuart and Murray filed a cross bill to quiet their title as against all other parties to that proceeding; I will ask you whether Union Pacific Railroad Company, the present defendant, was a party to that proceeding. A. It was not.

65 Q. Was the Kansas Pacific Railway Company, the Union Pacific Railway Company, Eastern Division, the Leavenworth, Pawnee & Western Railway Company, The Union Pacific Railway Company or any company predecessor to the present Union Pacific Railroad Company, a party to that proceeding?

A. Neither of the companies mentioned were a party or parties to the proceeding.

Q. Was any person or corporation representing the interest or title claimed by any of those railroad companies as trustee or otherwise, made a party to that proceeding?

A. None that I know of.

Q. State, Judge Stuart, if you can, who were the parties, plaintiff and defendant, to the proceeding in question.

A. George W. Harrison was plaintiff, Thomas B. Stuart, Charles A. Murray, Frank Hunter, Mary B. Cole, George K. Aneher, A. M. Andrews, Joseph C. Helm (or Erastus Smith representing his interest), and others perhaps that I do not at this time remember

Q. Could you, during the recess, get an accurate list of all parties, plaintiff and defendant, and answer the question definitely thereafter?

A. That may be very hard for me to do; I may accomplish it, but I cannot promise you surely, I have aimed to give you here the names of such parties as claimed under either Iliff or Adams. There were several persons and companies made parties that were claiming under tax sales, and I have

66 not attempted to go outside to look after anything except that which pertained to the original title.

Q. Are you willing to say Judge Stuart, that in said proceedings no persons or corporations were made parties, or were parties plaintiff or defendant, representing or claiming to represent any right, title or interest, claimed by Union Pacific Railroad Company, or any of its predecessors in title?

A. I think that is the truth.

Q. When was that proceeding commenced, if you know?

A. Sometime since 1900; it was tried before Judge Carpenter.

Q. When was the final decree entered in said cause, quieting the title in Stuart and Murray?

A. That must have been about 1904, or '05.

Q. Was it before or after the commencement of the present proceeding in which your testimony is now being given?

A. It was before; that final decree was before.

Q. You stated, I believe, that an appeal had been taken from that decree? A. Yes, by a party named George W. Harrison.

Q. And the matter is now pending and undetermined in the Supreme Court of the state of Colorado? A. Yes sir.

Q. Judge Stuart, you have personally known this land since about the year 1887, have you? A. That is my recollection.

Q. When you first saw it was there a railroad track across the land? A. There was.

67 Q. Was it at that time in the same location that it is today, or was the last time you saw it?

A. You refer to that used by the defendant, and I say yes?

Q. I refer to the track now used by the Union Pacific Railroad. A. Yes.

Q. Was there at any of the times when you saw this land mentioned also a line of telegraph poles near the location of this railroad track to which you refer?

A. Well, to give it as a distinct recollection I could not, but I have no doubt but what there was.

Q. You made some reference in your direct examination to certain snow fences; where were those located, with reference to the track now used by Union Pacific Railroad Company?

A. The only fence that I remember of, of a few rods, was on the north side of the track used by the defendant.

Q. What was the character of these snow fences?

A. Well, I can not say, except that they were built as snow fences are ordinarily built, (witness indicates by lacing fingers together at tips) kind of crossed, so that the feet of the fence would rest on the ground; whether they were embedded in the ground I do not know; but it is the ordinary snow fence.

Q. It was a fence built of boards, I suppose?

A. It was a fence built of boards.

68 Q. About how far away from the track of the defendant Union Pacific Railroad Company?

A. Well, now, I do not know that; it may have been within the 400 feet as is claimed in the pleadings, and it may not have been. I can only remember of seeing it in one place.

Q. Were they parallel to the track?

A. They were parallel to the track; yes, sir.

Q. Were these snow fences there the last time you saw the land? A. Well, I could not say, Mr. Dorsey.

Q. Were they there the first time you saw the land?

A. I could not say they were; but I think they were there the first time I saw the land.

Q. Did you put the snow fences there, or cause them to be put there?

A. I did not. I have no doubt but what they were put there by the defendant.

Q. How lately have you seen the land, Mr. Stuart?

A. Well, I can only answer that in a general way, by saying two or three years.

Q. Between 1887 and two or three years ago, how frequently did you see the land?

A. Well, I was over it frequently; we were trying to sell the land, and went out there with parties that we thought might purchase; and I went out there to examine the land; how frequently, though, I could not say.

Q. Do you wish to be understood as saying that at none
69 of the times when you saw this land, that there was no fences there except that snow fence?

A. No fences that I remember of, except the snow fences.

Q. Never saw any other fences there? A. No, sir.

Q. You are quite positive about that? A. Yes, sir.

Q. You stated in your direct examination that in 1887, when you first went to the land, it had recently been surveyed by the Iliff heirs, and posts put at all the corners; is that correct?

A. Yes.

Q. How do you know that?

A. I only know by what they claimed at the time, and seeing what had been done, and the posts planted there.

Q. All you know about a survey made by or on behalf of the Iliff heirs is hearsay, more or less, isn't it? A. Yes, sir.

Q. And you stated on direct examination that after you went to the land first in 1887, a survey was made or caused to be made on behalf of the Adams interest which you represent?

A. Yes, sir.

Q. Were you present when that survey was made?

A. I was present when we first went around the land and verified the corners by the stakes that were there; and I was present, I think, afterwards on two different occasions when Adams was surveying out some tracts that he wanted to sell to some parties. Had negotiations on at that time—that is, negotiating, not a final sale.

Q. Adams himself did the surveying?

A. No; there were several of them there. I do not
70 remember who they were, except Hunter, and perhaps Cole was there; and Adams may have been there—I think he was.

Q. At how many surveys of the land actually made were you present?

A. None except those that were made by Adams and those parties that were surveying out there.

Q. How many was that, approximately?

A. Well, I think they were out there twice, and I think I was there with them out there twice.

Q. Then, on two occasions you were present when survey was made on behalf of Adams? A. Yes, sir.

Q. You stated in your direct examination that on those occasions the railroad track was surveyed in. What do you mean by that?

A. I mean we went right across it, across the railroad track; took it all in, and estimated it as a part of the land, and paid no attention to anything that was there.

Q. You mean by that that you walked back and forth across the railroad track, and carried your instruments, and ran your imaginary lines?

A. No, it was not imaginary. We had them there, staked off. We estimated it as being in our land. Whether it was or not, why, that is another question.

Q. That is what you mean by "surveyed in?"

A. Yes, sir.

71 Q. In your direct examination you made a statement about having applied to the present defendant company for an accounting with reference to their interest in this property: How many times did you apply to the present defendant company?

A. Now, in speaking that way, I speak for the firm, you know. What we did—I would say that we conferred with them half a dozen times,

Q. You and Mr. Murray, or one or the other of you?

A. Yes; and they would have it under advisement—

Q. Now state, please, to whom you applied.

A. Well, the first men that we talked with, I think, were Teller and Orahood; and about that time Deweese, the old gentleman, came to our office, with one of our clients, and I remember that he talked to me, and he said that at one time he had been the attorney in chief of Union Pacific Railroad Company—Eastern Division, perhaps. And that he thought that he could settle that matter; he had looked it up, and that he did something in it; but what he did I do not know; but at the time he did not pretend to be the attorney of the company.

Q. Then your application was made to Teller and Orahood, was it? A. Yes.

Q. All of your applications were made to Teller and Orahood, were they?

A. I do not think that we ever wrote to the company; that is, I do not remember that I ever did, independent of Teller and Orahood. We submitted our letters to them.

72 Q. Between what times were those applications made to Teller and Orahood?

A. Well, they commenced before the settlement of the—or about the time of the decree in the Adams case; and when they

concluded I do not know. Mr. Murray can tell you more about that than I can.

Q. Could you state approximately when these negotiations concluded?

A. Concluded? No, I could not; but it has been within the last—I can only say, from the commencement of this suit—I think very soon after we found out that we would have to bring the suit, that we brought it—perhaps within a year, or such a matter.

Q. Well, who were Teller and Orahood?

A. Teller and Orahood were the general counsel, as I understood, of Union Pacific Railroad Company, the defendant in this case, and occupied the same position toward the company that I understand you do now, Mr. Dorsey; and they seemed to be the chief authority in this state to apply to, and through them we applied to the company. We did not expect them individually to use their own judgment about it, but to confer with their client, and report to us what the company would do.

Q. Then, they were the general attorneys for the state of Colorado for the Union Pacific, were they?

A. Possibly so. I don't know, Mr. Dorsey. If that is the case, why, I don't know.

Q. On your direct examination you stated that the owners of the property—by which I presume you mean the Iliffs and Adams, and those representing the Iliffs and Adams—crossed the track of the railroad company whenever they saw
73 proper, and wherever they saw proper; is that right?

A. Yes.

Q. How do you know about that?

A. I do not know much about the Iliffs, but I do know about the Adams, because I have been over that tract with them, and when we were surveying lands as I referred to, and while going out there frequent times we went across that track.

Q. You walked across it, or you crossed it driving?

A. Driving.

Q. Is this an ordinary railroad track?

A. It is an ordinary railroad track; yes.

Q. Has it an embankment or a cut there?

A. There are some small cuts there. I didn't drive through the cuts, although I do not believe there is a cut that a man could not drive through.

Q. How about embankments?

A. I do not believe there is any embankment there.

Q. Any crossing, with planks between the rails? A. No.

Q. You just drove right over the naked rails?

A. Yes. It was not as smooth as driving other places, but that is the way we wanted to go.

Q. You stated on your direct examination that the taxes had been paid by the Iliff heirs since 1866, up to the time of some accounting concerning which you introduced an exhibit, at which time you and Mr. Murray reimbursed the Iliff
74 estate and the Iliff heirs, and after that time you—Stuart and Murray—paid the taxes up to and including the first half of the taxes for 1907, and that during that period neither the Kansas Pacific, or the Union Pacific, or any of its predecessors paid any taxes on that: Is that correct?

A. Yes.

Q. Do I correctly state what you meant to say? A. Yes.

Q. How do you know about what the Iliff heirs paid, now?

A. I know from the accounting.

Q. You have no personal knowledge?

A. No; personal knowledge I have none.

Q. You know simply what they said that they did, and through this accounting?

A. I know we had to put up $3800, or something thereabouts, a large amount.

Q. That is the only information you have?

A. I do not know anything personally.

Q. In that case neither the Union Pacific, or any of its predecessors in title were parties? A. No.

Q. You also stated that during this period, neither the Union Pacific nor any of its predecessors in title, paid any taxes on this property, if I understand you? A. Yes.

Q. How do you know that?

A. I know that from the facts that I have stated, as to who did pay the taxes, and I know they were none of them concerned in the payment of the taxes that I refer to.

75 Q. What you mean "them" is neither the Kansas Pacific Railway Company, The Union Pacific Railway Company, Eastern Division, The Leavenworth, Pawnee & Western Railway Company, The Union Pacific Railway Company, Union Pacific Railroad Company, or any predecessor in title of it, paid any taxes,—or Iliff, or of Stuart and Murray?

A. No, the taxes were against the land; all these taxes Iliff paid were against the land, and not against any of the individuals I refer to. I presume that it will be claimed by the defendant that it paid taxes on its right of way given in and listed, perhaps, with the state officers, under the state law, for apportionment, at that time. I do not know what the practice was in regard to that.

Q. Then, you have no personal knowledge as to whether or not the railroad company paid upon assessments made by the State Board of Equalization, or did not, or any of the predecessors in title, paid or not? A. No, sir.

Q. Have you any personal knowledge as to whether or not in the early days, prior to the adoption to the system of assessment by the State Board of Equalization of railroad property, this railroad, or any of its predecessors in title, paid locally?

A. Yes, I think that I know that they did not, on this land.

Q. How do you know?

A. We have followed that all the way through. They may have paid taxes locally, but no taxes on this land.

76 Q. Or any part of it? A. Or any part of it.

Q. Or any interest in it? A. Or any interest in it,

Q. How do you know that?

A. I know only from the record, and who has paid taxes on this land.

Q. Did you make an examination of these records to see whether it was paid by Union Pacific Railroad Company, The Union Pacific Railway Company, Eastern Division, The Leavenworth, Pawnee & Western Railway Company, or any of the predecessors in title?

A. I have examined thoroughly, and I do not find those companies, or any one of them, connected with it.

Q. Then you state, from what you have seen in examining the records, that none of these railroad companies paid on, a local assessment, at any time since 1866, do you? A. Yes, sir.

Q. And you have no other knowledge upon the same except what your examination of the records disclosed? A. No.

Mr. Dorsey: Defendant, at this point, will renew its motion to strike out all that has been testified to by this witness in reference to the non-payment by Union Pacific Railroad Company, or any of its predecessors in title, upon their claimed interest in this land.

Re-direct Examination

By Mr. Charles A. Murray:

Q. State what you may know, and your most reliable information therefor, as regards the date when the Kansas Pacific first placed its track upon this land, being the same track

77 now in use by the defendant company herein.

Mr. Dorsey: Objected to as immaterial and irrelevant.

A. I do not know, personally, as I have stated, that I was on the land for the first time in the year 1887; I have tried to find out when the track was first placed there, and the most reliable information I can obtain is from Hall's History of Colorado, and I think, also, from Frank Hunter, who is now dead. Hall's History is to the effect that the track was not placed on the land, or that the Kansas Pacific built into Denver before

perhaps about the middle of the year 1870. I can only testify to history upon this subject—not to personal knowledge, and would say therefrom, the best information I can receive, that the track was not placed there before the year 1870, if it was placed there in that year.

Mr. Dorsey: The defendant Union Pacific Railroad Company moves to strike out the answer, as being mere hearsay, and not the best evidence; also because it is immaterial and irrelevant.

Q. State what you may know, if anything, about the Leavenworth, Pawnee & Western Railway Company, or The Union Pacific Railway Company, Eastern Division, or the Kansas Pacific Railway Company, or any of the companies named in this proceeding, ever having built or constructed their lines to a union with the Union Pacific Railroad Company at or near the 100th meridian of longitude.

A. I can only answer this question by my knowledge, in riding over the main line of the Union Pacific and the line
78 of the other companies; and would say that they did not at any time ever build to or unite with the main line of the Union Pacific at the point stated, or at any point west of that, except through Denver to Cheyenne.

Re-cross Examination

By Mr. Dorsey:

Q. Referring to the Leavenworth, Pawnee and Western Railroad (or railway, whichever it is): Was that a corporation organized under the laws of the Territory of Kansas, by special act of the legislature of that territory?

A. I think it was. I take that from your pleadings, and I think you are right about it.

Q. Was its name afterward, and prior to the year 1864, changed to The Union Pacific Railway Company (or Railroad Company—I have forgotten which) Eastern Division?

A. It was changed after that, but the date I do not remember.

Q. And was the name afterwards changed to the Kansas Pacific Railway Company,—of this same corporation?

A. It was. The dates I can not remember.

Q. Was the Kansas Pacific Railway Company, the Denver Pacific Railway & Telegraph Company, and Union Pacific Railroad Company, the original congressional corporation in the year 1880, consolidated into The Union Pacific Railway Company? A. I think so.

Q. You are willing to admit that?

A. I am not going to deny it. I do not know it as a fact, and I won't deny it. I think that is correct, and I am not
79 going to deny it, and I do not ask for any proof on the proposition.

Q. The several corporations mentioned are the same corporations mentioned by these names in the various acts of congress relating to the Pacific railroads, are they not, Judge?

A. I think they are the same throughout.

Q. The line of the Leavenworth, Pawnee & Western, afterwards known as Union Pacific, Eastern Division, afterwards known as Kansas Pacific, was actually constructed through Denver and to a connection with the main line of the Union Pacific at Cheyenne, was it not, Judge?

A. I think that was the case; at least, I have not looked to see that it was not, and I do not find that it was not. I have taken the acts of Congress into consideration, and I think that is the case.

Q. And the line was constructed, in its progress from the Missouri River to and through Denver, and to a connection at Cheyenne, passes over the lands described in your bill of complaint, and claimed by Stuart and Murray, does it not?

A. Yes, sir; I think it did.

Thereupon this hearing was adjourned until 2:00 p. m. of Monday, April 6, 1908.

At 2:00 p. m. of Monday, April 6, 1908, said parties met pursuant to adjournment, present as before, and this hearing was adjourned until Wednesday, April 8, 1908, at 10:00 a. m.

80 April 8, 1908, 10:00 a. m.

Said parties met pursuant to adjournment. Present as before.

Thereupon the following proceedings were had:

Thomas B. Stuart was recalled for further examination.

Mr. Stuart: I wish to introduce Exhibit 14 in evidence.

Mr. Dorsey: I will object to Exhibit 14, not because the copy is offered instead of the original, but because it is otherwise incompetent, irrelevant and immaterial; and especially because it appears to have been acknowledged subsequent to the date of the commencement of this action, and therefore, presumptively, delivered subsequent to said date.

Re-direct Examination

By Mr. Dorsey: (continued);

Q. Judge Stuart, referring to Exhibit 14, which purports to be an instrument between Elizabeth Iliff Warren, William S. Iliff and Louise Iliff, and Edna Iliff Briggs on the one part, and Thomas B. Stuart and Charles A. Murray on the other; it appears that the same was acknowledged by Edna Iliff Briggs on May 31, 1906. Will you please state when this instrument was actually delivered to Stuart and Murray or either of them?

A. The instrument is dated the 25th day of March, 1901, and we were between that date and the date given by Mr. Dorsey in getting the different signers—getting it back from them. It had to go to foreign lands, I understand, in reference to some of them, but I think the last acknowledgment is dated

81 April 21, 1907—no that is not right.

Q. The last acknowledgment is dated May 31, 1906.

A. Yes, that is right; and I do not believe that the instrument was finally delivered until that last acknowledgment. It was in preparation all this time.

Q. It appears to have been acknowledged by three of the parties in the city and county of Denver, on January 25, 1906, and by the other party in the city and county of San Francisco on May 31, 1906. Is that correct?

A. I think that is correct. The paper followed Mrs. Briggs through Japan and around back to San Francisco before we got the acknowledgment.

THOMAS B. STUART.

Subscribed and sworn to before me this 6th day of April, 1908.

SANFORD C. HINSDALE,
Examiner.

Charles A. Murray, one of the complainants, produced as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stuart:

Q. State your name, age, residence, and occupation.

A. Charles A. Murray; age, fifty seven; residence, Denver, Colorado; occupation, attorney-at-law

Q. How long have you resided in Denver?

A. A little over eighteen years.

82 Q. How long have you been acquainted with the land, if at all, described in the complaint in this action?

A. I think since the latter part of 1892.

Q. State what has been the character of that land, as to being improved or not, or fenced, during the time you have known it?

A. I visited the land a good many times; I have never seen any improvements upon any part of it, or any fencing, unless it would be some barriers against snow drifts for a short distance along the north side of the railroad track crossing the southern part of the land; and unless certain stock pens recently erected are upon the land, and I understand they are not, I do not know just where the land is—the east line.

Q. State what you may know as to the plaintiffs and their grantors in title exercising acts of ownership, control and possession of the land described in the complaint during these years you have been acquainted with it?

Mr. Dorsey: That is objected to as immaterial and irrelevant.

A. I was not present at the making of any surveys on the land and as to that feature can only speak from the general business of our office. I know that soon after the original decree was entered, in 1892, I was over the land once or twice,
83 and a little later than that I entered into negotiations with certain dairymen doing business near the boundaries of this land for leasing the land to them in connection with their dairy business. These negotiations were carried on at one time with Mr. Ebert, the proprietor of the London Dairy, which is located on the north or northeast of this land; later with Mr. Stratton, who owned a dairy south of the land in question. These negotiations were carried on for two or three years, but we never succeeded in making a lease or deal with either of these parties. After these negotiations, I took up the matter with a dairyman living directly east of the city, whose name I cannot now recall, but who at that time was doing a dairy business on part of what is known as the Bell Estate, and for a year or two we attempted to make a deal with him either to use the property for dairy purposes or to fence it and put it under cultivation. These negotiations dragged along for two seasons, as I remember, but we came to no agreement on that. Four or five years before the beginning of this action I took a gentleman from Iowa by the name of Miller who was out here making some investments in Colorado property, and he and I drove over the land at different points, with a view to inducing him to make a purchase of a part or all of the property. We spent a good portion of the day in driving over and examining the property and its immediate

surroundings. This gentleman took the matter under advisement, but we failed to make a deal with him. Since that,
84 and about the time this suit commenced, and a little before, I took a party—a man and his wife—or two gentlemen and the wife of one of them in an automobile, and rode all over the land, or over a good portion of this land, with a view to making a deal by which an exchange of some property near Greeley was proposed for this property in question; had some proposition both ways, but none of these ripened into a deal and the matter was finally dropped. During these years from 1892 up to the time of the beginning of this suit, and since, I have at other times, or different times, taken other persons over the land, and have in several instances suggested to the dairymen living in the neighborhood that they ought not to pasture their cattle on this land, as they were doing at different times, without compensating the owners, but notwithstanding these efforts, they continued to use it for pasture purposes, because the land had remained wholly unfenced.

Q. Independent of having parties out there to sell to them, have you, under claim of being a part owner in them, been over the lands frequently yourself during the years mentioned, or any members of your firm?

Mr. Dorsey: I object to that as immaterial and irrelevant.

A. I think I have answered that by saying that I have at other times been there with other people. I do not think there has been a year that I have not visited the land and
85 looked after it under this claim of ownership.

Q. State what the plaintiffs in this action may have done toward paying the taxes on said land, and the periods between which they have paid taxes, or accounted for taxes that have been paid, and give the amount as nearly as you can of all taxes paid by complainants?

Mr. Dorsey: I object to the question, because it is irrelevant and immaterial.

A. I personally and on behalf of Thomas B. Stuart and Charles A. Murray, the complainants, paid the amount required by a certain decree of the district court in evidence, to reimburse the Iliff parties for taxes theretofore paid by them from 1867 down to the date of such decree, the sum of $3,797.42 for which I hold the voucher of the clerk of the district court which I now offer in evidence as Exhibit 16.

Mr. Dorsey: I move to strike out the statement, from "1867" down to the date of such decree" for the reason that it is not the best evidence and is incompetent, immaterial and irrelevant.

I want to object to Exhibit 15 for the reason that it is immaterial and irrelevant.

A. (continued) I find by examination of the books, checks and vouchers of the firm of Thomas B. Stuart and Charles A. Murray and know also from my personal knowledge, that the plaintiffs paid in the year 1905 the additional sum of $1,865.85 in redemptions from tax sales of portions of these lands
86 which had theretofore been neglected and had gone by default, for which redemptions we hold the certificates at this time. These redemptions were for different undivided interests and portions of the lands in controversy for the years from 1893 to 1903, inclusive. I would not say that the certificates I hold here (indicating papers in his hand) are all the certificates; I think there are one or two more that I cannot lay my hands on, but substantially all the certificates for this money are here and shown.

Mr. Dorsey: I move to strike that portion of the answer out beginning with the words "These redemptions" and ending with "are here shown", for the reason that it is irrelevant and immaterial.

Q. Give the total amount as near as you can, of the taxes paid by the complainants herein by way of refunding, redemption, or direct payment by them, between the years 1867 and the first half of the taxes of the year 1907.

Mr. Dorsey: I object to that because it is immaterial and irrelevant.

A. The total amount paid by the plaintiffs, including the amount paid to reimburse the Iliffs, for taxes paid by plaintiff on their own undivided interests during the years mentioned; the amount paid for redemptions as already stated, and the taxes paid by plaintiffs since that time on the entire tract, amount to something over $6,000.

Q. State what you may know in reference to negoti-
87 ations with the defendant herein in reference to its track running over a certain portion of the lands described in the complaint; give fully all you may know concerning the matter.

Mr. Dorsey: I object to this question as being too general in form, and it is incompetent, irrelevant and immaterial, and no statements made in connection with such negotiations could be binding upon the defendant, nor admissible as an admission upon the part of the defendant or otherwise.

A. Between the years 1892 and 1895, I think—

Mr Dorsey: I object particularly to anything that occurred between 1892 and 1895, for the reason that the present defendant certainly can not be bound by any negotiations had at that time; immaterial, irrelevant and incompetent.

A. (continued) Between those years, and I can not state just when, I first conferred with Mr. H. M. Orahood, who was I believe a member of the firm of Teller & Orahood, and spoke to him about the railroad track crossing these lands, and suggested to him that we could not find that either the Union Pacific nor the Kansas Pacific Company had any right to cross them; Mr. Orahood said that his attention had not been called to it, but he would look it up and see me further about it; later than that—and I can not fix the time, because the events went by rapidly—I saw him on other occasions and he said that the company for which he was attorney, and I did not know at that time whether it was the Union Pacific or Kansas Pacific but I think both—I think he was at that time attorney
88 for one of the Union Pacific Companies, and was appearing as such in the various courts of this state. He said the company would be disposed to settle the matter, but asked me if the title was finally established in us. About that time or just previous to that time a bill of review had been filed by the Iliffs; that was in 1895, in May. I told Mr. Orahood that the matter was reopened as far as the bill of review was concerned, and he said, "You come back to me again when the litigation is settled, so that we can know with whom we can deal, and I will try to adjust this claim as against this company for right of way." The bill of review was fought out, and was never disposed of until it reached the Supreme Court in April of 1899. I think in the meantime I met Mr. Orahood once or twice again, and we talked about the litigation, and I told him it was in the Supreme Court. He had more than once told me he would have to let the matter rest until the title was settled; that they could not deal with people safely unless they know they were the owners and suggested again that we let the matter stand until the bill of review is settled. In the meantime this bill of review brought into court this George W. Harrison as a party, and very soon after the bill of review was disposed of in the Supreme Court, Mr. Harrison commenced his litigation—at least quite a little while after the bill of review was disposed of, Mr. Harrison commenced a suit in
89 which he claimed some interest in the real estate, and his claim was tried and decided finally in the district court February 15, 1905, in which we obtained a decree quieting title as against him, and from which he appealed. I do not know that I ever talked with Mr. Orahood any further, because I

think that he retired from the attorneyship of the company prior to 1905—perhaps prior to 1900—I do not know just when he did go out of the position, but there was a change in attorneys sometime during those years.

Mr. Dorsey: I move to strike out all the testimony of Mr. Murray relating to conversations with Mr. Orahood, and all statements alleged to have been made by Mr. Orahood, for the reason that the same are incompetent, immaterial and irrelevant; that they are mere hearsay, and not binding upon this defendant, either as an admission or otherwise; I further move particularly to strike out all testimony given by Mr. Murray relative to conversations with Mr. Orahood which occurred prior to the date in 1898 when present Union Pacific Railroad Company, defendant herein, acquired title, through foreclosure sale, to the property formerly belonging to the Kansas Railway Company, for the reason such testimony is incompetent, immaterial and irrelevant; is mere hearsay, and is not binding upon the present defendant, either as admission or otherwise.

Q. Did the defendant company, through its attorney Orahood, or otherwise, ever make any claim of title to right of way through said land, in the negotiations you had with them; if so, give what was said by them.

Mr. Dorsey: That is objected to as incompetent, immaterial and irrelevant; as mere hearsay, and not admissible
90 against this defendant; and further because it does not appear that at the time of said conversations, or any of them, Mr. Orahood was attorney for this defendant, or for any other person or corporation whose statements or admissions would be binding upon this defendant.

A. Nothing was ever said by Mr. Orahood, or by anyone else on behalf of the defendant company, or any other railroad company, intimating or making any claim whatever of a right of way across any portion of the lands in controversy; and I never heard any such claim until after this suit was commenced.

Q. Did you know of any higher authority, or any person standing higher in the councils of the company, of the K. P. Company or U. P. Company, to apply to in reference to this matter; that is, I mean to say, any person or persons higher in authority than Teller and Orahood, in this state?

Mr. Dorsey: That is objected to as incompetent, immaterial and irrelevant.

A. I did not know of anyone else. I have an impression, but I have not looked it up, and can not say certainly, that we wrote to the general officers of the company at Omaha—

Mr. Dorsey: I would certainly move to strike out what is said about his impression as to what he wrote, or having written, for the reason it is not the best evidence, is incompetent, immaterial and irrelevant.

Q. What do you know about the firm of Teller & Orahood being the general attorneys of the K. P. and the U. P. in
91 this state, having in charge all of their business during these years that you have referred to?

Mr. Dorsey: I object to the question because it is leading in form; incompetent, immaterial and irrelevant.

A. Why, I know that at all the times I talked with Mr. Orahood as testified, frequently, Mr. Orahood, or the firm of which he was a member represented the companies mentioned, or at least the Union Pacific company, in its legal matters in this state, and I know that we had in one or two matters negotiated with them for settlements of claims—that is, actions, on behalf of this company or one of these companies.

Mr. Dorsey: I move to strike out the answer, as incompetent, immaterial and irrelevant.

Cross Examination

By Mr. Dorsey:

Q. Mr. Murray, you say you first saw this land in 1892?

A. I think that was the first year I ever saw it.

Q. How frequently, from 1892 up to the time of the commencement of this suit, were you on the land, how many times?

A. Well, there was possibly a year or two that I did not see it, and then I would see it, I should think, once a year, possibly more than that.

Q. You averaged about ont visit per year during this period?

A. I think at least that, and probably a little more.

92 Q. How much more?

A. Well, it would not average over two visits a year.

Q. These visits were of the general character which you have described, going out there in a buggy or an automobile, and coming back, were they not, on the same day?

A. Yes; I don't think I ever camped over night on the land.

Q. How long a time would you stay on the occasion of each visit?

A. Well, I think one of these visits I mentioned, we were on the land probably all day. The others were half a day or less.

Q. Were you on the land on the day when you commenced this suit?

A. I do not believe that I was, Mr. Dorsey. I would not say that I was not, but I do not remember the date of the beginning of this suit.

Q. How long a time prior to the commencement of this action had elapsed since you had been on this land? Suit was commenced April 21, 1906.

A. I can not tell exactly; I should say not more than six months, or during the preceding spring or summer; not more than six months or a year, or in the preceding spring or summer.

Q. None of the attempts which you made of leasing this land were successful, were they? A. No, none of them.

Q. You never did lease it to anybody, did you?

A. Never did.

Q. And you never fenced it, or caused it to be fenced?

A. No.

Q. Did people living in the vicinity allow cattle or other stock to graze on the land?

A. Well, I have seen livestock on the place that did not
93 belong to us, and I am quite positive that some of those dairymen did permit their cattle to graze on the land; and possibly other people did.

Q. When was it that you took this party out in an auto, with an idea of exchanging this land for property in the Greeley district?

A. I think, Mr. Dorsey, that was since this suit commenced. That was in 1906; some time last year.

Q. Well, at that time you knew of the claim that Union Pacific Railroad Company was making to the right of way 400 feet in width, did you not?

A. Well, I could not say that. I knew it when the answer was filed, and it is likely I did, for your answer must have been filed earlier than the middle of 1907.

Q. You stated in your direct examination that from time to time you told dairymen and other persons living in the vicinity not to use the land or allow their cattle to graze thereon; were those directions of yours observed by these parties?

A. I do not know that I put it in that form, Mr. Dorsey—that I told them not to. I spoke to at least two of them, and suggested that they ought not to pasture the land without compensation to the owners; I do not think the suggestion was observed.

Q. In respect to the matter of taxes: The first taxes you paid, or rather, the first money you paid on account of taxes, was when you reimbursed the Iliff heirs for what they had theretofore paid; is that correct?

A. No; I think we had paid some taxes on the un-
94 divided interest we then claimed prior to that settlement—the payment of $3700.

Q. You have referred several times to an undivided interest which you claim; what was that undivided interest, and when did you acquire it?

A. Originally the firm of Thomas B. Stuart and Charles A. Murray and A. M. Andrews acquired from Andy M. Adams, or his trustee,—and, I think, from both Andy M. Adams and C. O. Atkins—an undivided one-fourth interest in all these lands, and that interest was held for some years before the settlement and payment of $3700 that I have mentioned.

Q. On what date did you make this payment of $3700 to the Iliff heirs, approximately?

A. I think this voucher shows (referring to papers)—1905, I think.

Q. That payment was made in 1905, was it?

A. No—let's see—I will have to refer to that voucher, if that gives the date (examining Exhibit 15) "3/26/01."

Q. 1901, was it?

A. I presume that is correct. Let's see. (referring to other papers) Those exhibits will show, Mr. Dorsey. The decrees were rendered for this money, and they will show, I presume that is correct—1901. I am not positive of it.

Q. Well, prior to 1901, if Stuart & Murray had paid any taxes, they would have paid on the undivided one-fourth interest which they claim to have owned as you have described, would they not?

95 A. Yes; we had kept up the payments on one quarter interest. I am not sure but what we paid more than that on some other interests in the mean time. I am not positive. I know that we kept up the one-fourth interest.

Q. From 1901 until 1903, when you made said redemptions from tax sales, did you make any payment of any taxes on anything except your undivided one-fourth interest?

A. I could not say positively that we paid on anything except that one-fourth interest, and yet it seems to me that we did pay more than that, for the reason that Mr. Adams, our client, had died in the meantime—he had an interest, and I think we made some payments on his interest; I am not going to be certain about it.

Q. Whatever you paid was for him, was it, at that time?

A. Yes, prior to this decree.

Q. Now, I understand that in 1903 you made certain redemptions and paid a considerable sum of money for redemptions from previous tax sales, between the years—for taxes accruing between the years '93 and 1903; is that correct?

A. That is correct.

Q. Did those redemptions have reference to taxes which had accrued on other undivided interests than the undivided one-fourth which you got by deed from Adams?

A. Yes. After the decree upon which that $3700 was paid, and under which we were subrogated, as the decree recites; we then attempted to pay on everything, or redeem on every-
96 thing, so as to clear up the entire 160.

Q. When did you first begin to pay on this undivided one-fourth interest that you have spoken of?

A. Well, now, I could not tell you that, Mr. Dorsey. I think we commenced paying from the date of the deeds executed by Mr. Adams, or his trustee, and they may be in evidence there (pointing at exhibits), but I can not fix the date accurately, when we did commence.

Q. You stated, I believe, that your conversations with Mr. Orahood occurred between 1892 and 1895; is that correct?

A. No, I said that I thought the beginning of them was somewhere between those two years, and they continued later than that.

Q. Did you have any conversations later than 1905?

A. Yes; I am quite sure I did.

Q. How long afterwards did they continue?

A. Well, I think after that bill of review was filed, which was in 1905, and while it was in the Supreme Court, for two or three years after that I met Mr. Orahood on one or more occasions, and renewed the conversations, as I have testified.

Q. Well, those subsequent conversations were general discussions of the subject, were they, as to the conditions of your litigation?

A. Well, not very general; but mention was made that the title was still in litigation, and he did not feel disposed to take any other final steps until that was disposed of.
97 Q. You spoke in your direct examination about some litigation with a man named Harrison, in which a decree in your favor was made, in 1905: Has an appeal been prosecuted from that decree?

A. It was taken, but Harrison's claim was under the old Adams title, and that was wiped out by this subrogation of the Iliff interests to us. His claim was under the old Adams title, same as our old claim.

Q. Well, is there an appeal now pending in the Supreme Court, under that issue?

A. His appeal is still in the Supreme Court, under that issue.

Q. Was this case that you have mentioned, in which Harrison was a party, the same case testified about by Judge Stuart, in which you filed a cross bill to quiet your title against a number of persons?

A. That is the only litigation in the neighborhood there with Harrison that I know of.

Q. There were also a number of other persons involved?

A. Well, those were those tax claims, all of which, I think, were included in the original litigation.

Q. Well, whatever the various conflicting claims of these various parties may have been involved in that litigation, the entire matter is now pending on appeal in the Supreme Court?

A. Oh, no; there is nothing pending in the Supreme Court except the small claim of Harrison, which was based on the Adams title, and which we contend has been obliterated
98 by this subrogation of the Iliff interests.

Q. That is your contention?

A. Yes, and we are sustaining it.

Q. The Supreme Court has not yet dismissed the appeal, or determined the appeal? A. No, sir.

Q. In your direct examination, Judge Stuart inquired of you whether during your conversations with Mr. Orahood or anybody else representing the defendant company, Mr. Orahood or anyone else representing the defendant company, made any claim to owning any right of way for this railroad through the land: Did you ever converse with anybody else about it, except Mr. Orahood?

A. I do not remember that I did, Mr. Dorsey. Possibly someone in Mr. Orahood's office talked with me once or twice about it. I believe that Mr. Ritter was in there once or twice and talked about it.

Q. Mr. Ritter was not in there—

A. He was in there at one time as Mr. Orahood's assistant.

Q. That was long after Mr. Orahood ceased to have anything to do with the railroad.

A. Well, as I say, I am not sure. I do not remember any conversation excepting with Mr. Orahood himself.

Q. On your direct examination, Judge Stuart inquired what you knew about who Teller & Orahood were attorneys for, whether the K. P. or the U. P.: Have you any idea at all that they were at the times you have mentioned attorneys for the Kansas Pacific Railway Company?

A. No; I have no recollection of having dealt with
99 them as attorneys for the Kansas Pacific Railway Company.

Q. Don't you know that for many years prior to the times you have mentioned, the Kansas Pacific disposed of all its property to another company?

A. Well, I think so, but, as I say, I am not familiar with the time that those changes took place.

Q. So you do not mean to testify that Teller & Orahood were attorneys for that railroad?

A. No; I am not sure. I know that changes were made.

Q. Now, as to Teller & Orahood: Do you know for what railroad they were attorneys?

A. Only this: I know that whatever U. P. railroad company was doing business here in this state was represented at that time by Mr. Teller and Mr. Orahood.

Q. Don't you know, as a matter of fact, that there have been three U. P. companies, the first, the original congressional corporation, organized in 1862, called The Union Pacific Railroad Company; second, the corporation organized by consolidation of several companies, called the Union Pacific Railway Company; and, third, the present defendant company, which is organized under the laws of Utah, and called Union Pacific Railroad Company?

Mr. Stuart: I object, as not being cross examination, and not being material, the parties herein having consented to admit the right to defendant's property on the broad question of the respective titles, involving no technical points of when any particular company may have been organized or
100 doing business.

Mr. Dorsey: I have never consented to anything like that. I consent to nothing except what is shown by the pleadings in this case. I object to having Mr. Stuart attribute any admissions to the present Union Pacific Railroad Company made by someone who had no authority to admit anything, and trying to bind it in this case.

A. Personally I can not say that I know anything about these successive changes in name or interest, or the dates; I do know that these various names have been used through many years past in railroad circles in this state, and I know, from my examination of one set of papers in the Federal Court, that the present company, the Union Pacific Railroad Company was the last name used in the pleadings I have spoken of.

Q. Then you did not know when you answered the question propounded by Judge Stuart, to which I have referred, that the U. P. company mentioned by him is any of these three companies, or, if it is, which one it is, do you?

A. No, I can not say that—what he refers to by the term "U. P. company."

Q. Then you do not mean to say, do you, Mr. Murray, that the U. P. company that you claimed Teller & Orahood represented at the time of these conversations, is Union Pacific Railroad Company, the defendant in this suit?

A. Not knowing the date of these changes, I can not say definitely as to that.

Q. Did you have any conversations with Mr. Orahood on this subject subsequent to January 1, 1898?

A. 1898—Well, I can not tell whether I did or not.

101 Re-direct Examination

By Mr. Stuart:

Q. Whatever company may have been in existence at the particular time or times of these conversations, that claimed or that was using that track across the land in controversy, did Teller & Orahood claim to represent them?

Mr. Dorsey: I object to that, as incompetent, immaterial and irrelevant, and not proper re-direct examination It does not make any difference what Teller & Orahood claimed.

A. They not only claimed, but did, represent the company that was doing business upon the line of railway across this land at the time I speak of; at least, they appeared for that company in the courts.

Q. The firm of Teller & Orahood were considered honorable, upright men, and did not make a practice of representing clients that they were not employed to represent?

Mr. Dorsey: I object to that as incompetent, immaterial and irrelevant; not proper re-direct examination; and, further, I will admit that the firm of Teller & Orahood were, and the surviving member of that firm is, honorable and upright in all particulars.

A. They were entirely honorable and upright, and so was Mr. Orahood after the termination of the firm, and still is.

Q. Now, in this talk or talks that you may have had
102 with them, was anything said at any time about their taking the question up with the company? If so, what?

Mr. Dorsey: I object to that, as not proper re-direct examination; as incompetent, immaterial and irrelevant; not the best evidence, and mere hearsay.

A. That was the substance of the first conversation I had with Mr. Orahood, that he would consider the matter with the company, and would report later to us.

Q. Was or was not your object in speaking to Teller & Orahood to get at the company and ascertain what they would do?

Mr. Dorsey: I object to that, as not proper re-direct examination; incompetent, immaterial and irrelevant.

A. That was the sole purpose of talking to Mr. Orahood about it, was to get the matter before the company operating its line of railway over this land.

CHARLES A. MURRAY.

Subscribed and sworn to before me this 6th day of April, 1908.

SANFORD C. HINSDALE, Examiner.

Thereupon this hearing was adjourned until 2:00 p. m. of this 8th day of April, 1908.

April 8, 1908, 2:00 p. m.

Said parties met pursuant to adjournment. Present as before.

Thereupon the following proceedings were had.

103 Charles D. Ford, a witness produced on behalf of the complainants, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Murray:

Q. State your name? A. Charles D. Ford.

Q. Do you occupy any official position in reference to the Land Office located in Denver?

A. I am Register of the United States Land Office at Denver.

Q. How long have you held the position of Register?

A. About ten years.

Q. Have you given the matter of examining the records of your office during your term of office your personal attention, more or less? A. I have; yes, sir.

Q. I will ask you, Mr. Ford, if you have recently examined the records of your office for entries relating to the east half of the northwest quarter, and northeast quarter of the southwest quarter, and northwest quarter of southeast quarter, section 20, township 3 south, range 67, west of the 6th principal meridian. A. I have.

Q. Have you found any entries relating to said lands?

A. I have.

Q. What do you find first in order of the records of your office?

A. (opening book) Referring to book, the tract book, showing the entry in section 20-3, S., -67, shows that the
104 east half of the northwest quarter, and the northeast quarter of the southwest quarter, and northwest of the southeast quarter of section 20-3, S., -67, was filed on as a

declaratory statement by Erastus E. Eastman on June 18, 1866, under declaratory statement No. 2264. The same record also shows that on January 2, 1867, Erastus E. Eastman made final proof upon the land described, which he paid for by warrant No. 105,577, and that the number of the cash entry was 589.

Q. Is that all that you find on that record pertaining to this land, in that book?

A. That is all that I find on the tract book pertaining to that entry, in that record.

Q. Can you designate this tract book, so that we can get the number and page?

A. This is the track book of 1, - 8,-67. It is numbered in my office 17.

Q. And what page did you refer to in your testimony?

A. On page 31.

Q. You have already stated that this is a portion of the records of your office? A. Yes, sir.

Q. The Land Office of the United States?

A. Yes; this is a part of the official record in my office.

Q. Do you find any other document or record pertaining to the same lands of record in your office?

A. I found the original declaratory statement filed by Erastus E. Eastman on the 18th day of June, 1866, for the land described.

105 Mr. Murray: We offer this declaratory statement in evidence, as Exhibit 16.

Mr. Dorsey: No objection. I will also agree on the record that the stenographer may copy this for the record, and return the original to Mr. Ford.

Q. Mr. Ford, have you made, or caused to be made, search of the files and records of your office to ascertain whether any other entries pertaining to this land, especially so far as any rights or way are concerned for any railroads, or any plats of such rights of way—? A. Yes.

Q. What can you say as to there being any such records, maps or plats in your office?

Mr. Dorsey: I will object to the question, because it is immaterial and irrelevant.

A. I do not know to what maps you refer. You have not designated any special map.

Mr. Murray: I think so. We will have the stenographer read the question. (Stenographer reads the two questions on this page).

A. Well, I have not found any.

Q. That is what I was getting at: You made search, and did not find it? A. I have not found any.

Q. Have you made more than one search for such papers?

A. Yes.

Cross Examination

By Mr. Dorsey:

106 Q. Have you ever examined the records of your office to ascertain whether or not the map of the proposed location of the Kansas Pacific Railway, or what was formerly known as Union Pacific, Eastern Division, or, before then, the Leavenworth, Pawnee & Western, had ever been filed in that office? A. I have.

Q. Have you found any data to indicate that any such map ever was on file in your office, or is now on file there?

A. No; I have not found any.

Q. Have you made any search of the files of your office for the purpose of ascertaining whether a map of definite location of the Kansas Pacific Railway, formerly known as the Union Pacific, Eastern Division, and before that as the Leavenworth, Pawnee & Western, is now, or ever has been on file in your office? A. Yes.

Q. Did you find any data in your office from which you could ascertain that such a map is now or ever has been on file there?

Mr. Murray: The plaintiffs object to this question, because it does not call for any record, or the contents of any record in said office, but asks for the conclusion of the witness, and to what he has found that indicates that there may have been such record.

A. I did find something; yes, sir.

Q. Well, state what you found, Mr. Ford.

A. I found an official letter, written by either the Commissioner of the General Land Office, or from the Secretary of the Interior's office, in which it made reference to the map of definite location as having been filed in my office on a certain date. That is all I—the only record I have ever found.

107 Mr. Murray: The plaintiffs move to exclude and strike out the answer of the witness, as being incompetent testimony, and hearsay, and not material to the issues in this case.

Q. Will you please state, if you recollect, what that date of filing was, of that location, as shown by the records you mention?

A. My recollection was that it was made September 24, 1870.

CHARLES D. FORD.

Subscribed and sworn to before me this 8th day of April, 1908.

SANFORD C. HINSDALE,
Examiner.

Thereupon the complainants rested their case.

Thereupon the hearing was adjourned.

United States of America,
District of Colorado—ss.

I, Sanford C. Hinsdale, duly appointed Examiner in Chancery by the circuit court of the United States for the district of Colorado, do hereby certify that on the days mentioned in the proceedings and depositions in this case, I was attended by the counsel and witnesses aforesaid, at my office, 803 Continental Building, Denver, Colorado; that said witnesses, to-wit, Thomas B. Stuart, Charles A. Murray and Charles D. Ford, were first duly sworn by me, according to law, as witnesses in behalf of complainants in the suit or cause in the caption hereto mentioned, and then examined before me orally by counsel; and by the consent of the parties by their
108 several solicitors, the examinations and depositions of said witnesses were severally stenographically written down, and afterwards typewritten; that the said examinations were had in the presence of the solicitors of the several parties who appeared herein; and that said depositions, after being completed and typewritten, were read over by the witnesses deposing the same, and were duly signed and sworn to by said witnesses so making and signing the same.

I further certify that the exhibits marked 2 to 16, inclusive, complainants' proofs, were duly introduced before me in behalf of complainants during the taking of said depositions, and Exhibits 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 14 and 16 are herewith returned and filed with my report.

I further certify that the foregoing is a true statement of all the proceedings had in the matter of taking testimony on behalf of complainants herein.

SANFORD C. HINSDALE,
Examiner in Chancery.

Endorsed: No. 4953. United States of America, District of Colorado. In the Circuit Court. Thomas B. Stuart and Charles A. Murray, Complainants, v. Union Pacific Railroad

Company, et al., Respondents. Complainants' Testimony. Filed Jun. 1, 1908. Charles W. Bishop, Clerk. S. C. Hinsdale, Examiner.

United States of America,
District of Colorado—ss.

In the Circuit Court.

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4953. vs. In Equity.
Union Pacific Railroad Company, Defendant.

Be It Remembered, that on the 25th day of May, A. D. 1908, at the hour of 2:00 p. m., by mutual agreement of the parties hereto, said parties appeared before me, Sanford C. Hinsdale, an Examiner in Chancery of the circuit court of the United States for the district of Colorado, at my office, No. 803 Continental Building, Denver, Colorado, to-wit, the complainants in said cause in person and the said defendant by C. C. Dorsey, Esq., of the firm of Dorsey & Hodges, its solicitors.

And on this day came before me also Thomas B. Stuart and Charles A. Murray, witnesses of lawful age, to testify and the truth to say as witnesses on behalf of the complainants in rebuttal in the suit and matter of controversy above mentioned and now pending and undetermined in said court; and the said witnesses, on giving their testimony in chief, having been by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth in the matter and suit in controversy aforesaid, being recalled for rebuttal testimony, were examined by me on oral interrogatories propounded to them by counsel, as in their depositions following appears, that is to say:

Thomas B. Stuart, one of the complainants, having been heretofore produced and sworn as a witness on behalf of the complainants, being recalled for rebuttal, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Murray:

Q. Have you examined in the United States Land Office the dates of entry and patent of the lands lying west of the land in controversy into the City of Denver and the end of the K. P. railroad? If so, give the numbers of the land with the dates before referred to.

Mr. Dorsey: The question is objected to, for the reason that the information sought is immaterial and irrelevant, and would be incompetent as not the best evidence, and is not proper rebuttal.

A. I have examined such records with the aid of Mr. Ford, the Receiver of the Land Office in Denver, and I give the dates of purchase and entry of the lands across which the Kansas-Pacific railroad track runs after leaving the land in controversy. The northwest quarter of the southwest quarter of section 20, township 3, range
111 67 west, was entered by location of land warrant on May 23, 1867. The northeast quarter of the southeast quarter of section 19, same township and range, was entered January 22, 1867. The west half of the southeast quarter and the northeast quarter of the southeast quarter, section 19, same township and range,was entered January 22, 1867. The southeast quarter of the southeast quarter of the same section, township and range, was entered May 23, 1867. The northeast quarter of the southwest quarter, section 19, same township and range, was entered January 30, 1866. The north half of the northwest quarter of the southwest quarter, section 19, was entered January 13, 1866. The north half of the south half, section 24, same township and range, was entered as follows: The southeast quarter July 23, 1873; the southwest quarter October 22, 1881. The north half of the southeast quarter, section 23, same township and range, was selected by the Union Pacific Railroad Company May 23, 1884, under its land grant, and patented February 18, 1891. This brings the line of the defendant's road into and near the center of Denver from east to west. There is nothing shown in these entries of any exception being made for right-of-way, and all of the entries were in behalf of individuals except that of section 23.

Mr. Dorsey: We move to strike out the answer as immaterial and irrelevant and not the best evidence, but mere hearsay and not proper rebuttal.

112 Q. Have you visited the lands in controversy recently and sought and obtained any information concerning the Horick and Midgett lease and the lease of Reudy, spoken of in the defendant's evidence? And also give such facts as you may have ascertained concerning the matters shown by the defendant's Exhibit A in reference to its right of way across these lands. State also what connection Reudy, Horick or Midgett has, or has had, with the title to the land in controversy.

Mr. Dorsey: That is objected to as calling for conclusions of the witness, and as not the best evidence, but calling for mere hearsay, as immaterial, irrelevant and not proper rebuttal.

A. I visited the lands a week ago today. I inquired first in relation to these parties named in the leases that have been introduced in evidence. I didn't find any of them except Mr. Reudy, and he was so very busy at the time that I didn't have the opportunity of talking to him. We have conferred by telephone with the party that owns the saloon marked on the map, but could get no satisfactory answer out of him; and he seems to be satisfied with his situation and title. I have frequently examined the title to the land in controversy and I have examined carefully the certified abstract of such title, which is very cumbersome, but I state from personal knowledge, by such repeated examinations, that neither Reudy, Horick nor Midgett have at any time ever been connected with the
113 title to the land in controversy, and I never heard of them making any claim to it. I found that on the north of the land in controversy there had been a few furrows run, which I presume is about 250 feet from the middle of the track—I didn't measure it—but I am satisfied it is that distance and wholly outside of any right of way claimed by the Railroad Company. This is the first time I ever saw that plowing. I also found the land had been fenced, as shown by Exhibit A, with a four wire fence, as I remember. Where the fence enters this land on the west, directly on the line, there are braces put in each way bracing the fence from each direction. The mile posts marked on the map are about 45 feet from the center of the track and the marking is made on the telegraph poles—no independent posts. The public road marked on the map, with which I have been acquainted ever since I have been acquainted with the land, lies immediately south of this fence and, as shown by this Exhibit A, is embraced now within the claimed right of way of 400 feet. I made inquiry about when the land was fenced and could get no direct information, the substance being that it was within the last five years. On the lands lying west of the land in controversy, toward the City of Denver, I found there have been stakes recently erected marking streets and avenues, indicating that the land had been plotted into town property. At no place on the defendant's line that I visited did
114 I find that it had attempted to include in its right of way, by fencing or otherwise, more than 50 feet on each side of the track. I examined the snow fences that are indicated on this Exhibit A. They bear the appearance of never

having been touched or repaired from the time they were put up. In some places rods of the fence is gone, leaving nothing but the stakes to which the support of the fence had been nailed. Then there would be a few rods of fence, and then another break, and much of the fence that is there is in disorder. Where the line of the road passes through the land in controversy there is a cut about mid way that would not be easily crossed, but there is no fill on this land; the fill is on the land west that is shown by this map, and possibly on the land east of the land in controversy. Were it not for the fence, there are many places on the land in controversy where the track could be crossed with a buggy, just as I have heretofore stated that I did cross it. I should say, if I have not already said it, that this is the first time I ever saw the railroad fence on the land.

Mr. Dorsey. The defendant moves to strike out the answer in its entirety as not proper rebuttal, as stating mere conclusions of the witness, as made up of statements based upon hearsay and as immaterial and irrelevant. Defendant separately moves to strike out those portions of the answer stating the conversation over the telephone with the saloonkeeper, stating the conversation with Reudy, stating the conversations and result of conversations with others as to the time
115 when the land was fenced, as being not the best evidence, immaterial, irrelevant, constituting mere conclusions of the witness. Defendant separately moves to strike out the testimony as to the result of witness's examination of the title and his conclusion that certain persons never had any interest in the title, as derived from such examination, for the reason that said statement is incompetent, immaterial and irrelevant, and mere conclusions of the witness and not the best evidence. Defendant separately moved to strike out that portion of the answer in reference to lands lying west of the lands in controversy, and in general as to lands other than the land in controversy, for the reason that the said portions of the answer are immaterial, irrelevant and not proper rebuttal.

Q. State whether or not you are acquainted with the market value of the land in controversy, and during what length of time your knowledge extends.

Mr. Dorsey: That is objected to as not proper rebuttal and immaterial and irrelevant.

A. I believe I am about as near acquainted with the market value of the land in controversy since 1893 as any one else, and

that is all I could say to qualify me as a witness as to what I propose to testify hereafter.

Mr. Dorsey: I move to strike out the answer as a mere conclusion of the witness, as immaterial and irrelevant, and insufficient to show his competency, based merely upon his belief and supposition.

Q. You may now state upon what your belief is founded, as stated in the last answer, and then give fully all you may know as regards the value of the land in controversy.

116 Mr. Dorsey: So much of the question as requests the witness to give a statement as to the value of the land in controversy is objected to, as the witness has not shown his competency, because the matter inquired about is not proper rebuttal and is immaterial and irrelevant.

A. Since my connection with the title to this land, and especially since 1893, I have frequently attempted to sell and dispose of it. I have perhaps placed it in the hands of a dozen real estate men and firms, as good as there are in Denver. I have not placed any price upon it but asked all of them to do what they could towards selling it and obtain an offer of some kind for it. I have offered to sell it on very long time or to divide it up into tracts to suit purchasers. I can truthfully say that I have fully tested the market in Denver with this land and have never received any offer upon it to exceed a suggestion of $25 an acre, and that was not a direct offer.

Mr. Dorsey: Defendant moves to strike out the statement of the witness as to the value of the land in controversy or as to offers or tentative offers made for it, for the reason that it is immaterial and irrelevant and the witness has not shown himself competent to state the value of the land, and he has attempted to do so, and the evidence is not proper rebuttal.

Q. Are there any indications that the defendant Railroad Company will ever have any use or call or necessity on its part for any other or greater right of way in width than it now actually occupies on the land? If so, state what they are.

117 Mr. Dorsey: That is objected to as not proper rebuttal, immaterial, irrelevant, calling for a mere conclusion, and asking for testimony as to a matter which has been conclusively determined by the Congress of the United States.

A. If in the course of time and human events it should become necessary for the defendant to double-track its whole line, it might require room for another track of standard gauge railroad and room for the cars to pass each other, which I think

could not exceed 25 feet from outside to outside. The 50 feet now fenced in by it is of no use whatever to it at this time, neither is there any indicated use for it, except for the one track of standard gauge road which it has crossing it.

Cross Examination

By Mr. Dorsey:

Q. On direct examination, Judge, you stated that you had never received an offer for the land of more than $25 an acre. Do you attribute that to some fault in the land itself or its location, or to the fact that the railroad of the Union Pacific Railroad Company bisects the land and cuts it up into irregular and small sized tracts to a certain extent?

A. The road crossing it possibly has some influence, but I don't believe there has been any market for land since 1893, in that direction.

Q. When you speak of market value of the land, or market for the land, you refer to opportunities to sell the same for purposes other than railroad purposes, do you not?

A. Yes, sir.

118 THOMAS B. STUART.

Subscribed and sworn to before me this 30th day of May, 1908.

SANFORD C. HINSDALE,
Examiner.

Charles A. Murray, one of the complainants, having been heretofore produced and sworn as a witness on behalf of the complainants, being recalled for rebuttal, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Stuart:

Q. Have you ever examined the abstract of title or the title in any way to the lands in controversy in this action, and if so how frequently?

A. I have several times examined the abstract of title for this land and have also referred to the records in several instances, but I have never traced the title complete by the records.

Q. Did you ever come across the names of P. B. Horick, Lee Midgett or Jacob Reudy in connection with the lands in controversy and the title thereto?

Mr. Dorsey: Defendant objects because not proper rebuttal, calling for a mere conclusion of the witness, not the best evidence and immaterial and irrelevant.

A. I never did see or find any of the names mentioned in connection with the title to these lands or any of said lands.

119 Q. Did you ever know or have any intimation of either of said parties having leased at any time any portion of these lands from the defendant company, until the leases were introduced in evidence?

A. I never heard of such leasing until during the taking of this testimony, at the time the leases were introduced.

Cross examination waived.

CHARLES A. MURRAY.

Subscribed and sworn to before me this 30th day of May, A. D. 1908.

SANFORD C. HINSDALE, Examiner.

Thereupon the hearing was adjourned.

United States of America,
District of Colorado—ss.

I, Sanford C. Hinsdale, duly appointed Examiner in Chancery by the circuit court of the United States for the district of Colorado, do hereby certify that on the day mentioned in the proceedings and depositions in this case I was attended by the counsel and witnesses aforesaid, at my office, 803 Continental Building, Denver, Colorado; that said witnesses, to-wit, Thomas B. Stuart and Charles A. Murray, were first duly sworn by me according to law as witnesses in behalf of complainants, in rebuttal, in the suit or cause in the caption hereto mentioned, and there examined before me orally by counsel; and by the consent of the parties by their several said solicitors the examinations and depositions of said wit-

120 nesses were severally stenographically written down, and afterwards typewritten; that the said examinations were had in the presence of the solicitors of the several parties who appeared herein; and that said depositions after being completed and typewritten were severally read over by the witnesses deposing the same and were duly signed and sworn to by said witnesses so making and signing the same.

I further certify that the foregoing is a true statement of all the proceedings had before me in the matter of taking testimony on behalf of complainants herein, in rebuttal.

SANFORD C. HINSDALE,
Examiner in Chancery.

Endorsed: No. 4953. United States of America, District of Colorado. In the Circuit Court. Thomas B. Stuart and Charles A. Murray, Complainants, vs. Union Pacific Railroad Com-

pany, Defendant. Rebuttal Testimony of Complainants. Filed Jun. 1, 1908. Charles W. Bishop, Clerk. S. C. Hinsdale, Examiner.

Exhibit No. 2, Complt's. Proofs,

S. C. Hinsdale, Examiner.

Certificate of Location.

United States
to
Erastus E. Eastman,

Filed for Record July 12th, A. D. 1867 at 9-½ Oc a. m.

121 Military Bounty Land Act of March 3, 1855, Register's Office Denver C. T. January 2d 1867. Military Land Warrant No. 105577, in the name of Elmira Huestis has this day been located by Erastus E. Eastman upon the E ½ of NW ¼ & NE ¼ of SW ¼ & NW ¼ of SE quarter of section 20 in township 3 south of range 67 west, subject to any pre-emption claim which may be filed for said land within forty days from this date.

G. M. CHILCOTT, Register.

Contents of tract located
160 acres.

For value received I Erastus E. Eastman to whom the within certificate of location was issued do hereby sell and assign unto John W. Iliff and to his heirs and assigns forever the said certificate of location and the warrant and land therein described and authorize him to receive the patent therefor.

Witness my hand and seal this 4th day of January, 1867.

(Seal) ERASTUS E. EASTMAN.

Attest:
Alex. W. Atkins,
Alexander Davidson,

5c Rev. attached.

Territory of Colorado,
County of Arapahoe.

On this 4th day of January, 1867, before me personally came Erastus E. Eastman, to me well known and acknowledged the foregoing assignment to be his act and deed and I certify that

the said Erastus E. Eastman is the identical person to whom the within named warrant was issued.

ALEX W. ATKINS,
Notary Public.

(5c Rev. attached)
(Notarial Seal)

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, Clerk and Recorder, in and for said city and county of Denver, in the state aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 15 at page 177.

122 Witness my hand and official seal this 27" day of March, 1908.

ALBION K. VICKERY,
Clerk and Recorder.
A. H. Williams, Dep.

(Seal City and County of)
(Denver.)

Stamped on margin: Examined.

Endorsed: United States to Erastus E. Eastman. Certificate of Location. Exhibit No. 2, Complt's. Proofs, S. C. Hinsdale, Examiner.

Exhibit No. 3, Complt's. Proofs, 3 pp.

S. C. Hinsdale, Examiner.

Warranty Deed.

Erastus E. Eastman
to
John W. Iliff,

Filed for Record July 12th A. D. 1867 at 9-1,2 Oc A. M.

This deed made this fourth day of January in the year of our Lord one thousand eight hundred and sixty-seven between Erastus E. Eastman of the county of Arapahoe and territory of Colorado, of the first part and John W. Iliff of the county of Arapahoe and territory of Colorado of the second part, Witnesseth, that the said party of the first part for and in consideration of the sum of one thousand dollars to the said party of the first part in hand paid by the said party of the second part the receipt whereof is hereby confessed and acknowledged hath granted bargained sold and conveyed and by these pres-

ents doth grant bargain sell convey and confirm unto the said party of the second part his heirs and assigns forever all the following described lot or parcel of land situate lying and being in the county of Arapahoe and territory of Colorado, to-wit:

The east half of the northwest quarter and the northeast quarter of the southwest quarter and the northwest
123 quarter of the southeast quarter of section number twenty "20" in township number "3" south of range number sixty-seven 67 west, containing one hundred and sixty "160" acres together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders, rents issues and profits thereof and all the estate right title interest claim and demand whatsoever of the said party of the first part either in law or equity of in and to the above bargained premises with the hereditaments and appurtenances: To have and to hold the said premises above bargained and described with the appurtenances unto the said party of the second part his heirs and assigns forever. And the said Erastus E. Eastman, party of the first part for himself his heirs executors and administrators, doth covenant grant bargain and agree to and with the said party of the second part his heirs and assigns that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good sure perfect absolute and indefeasible estate of inheritance in law in fee simple and hath good right full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid and that the same are free and clear from all former and other grants bargains sales liens taxes assessments and incumbrances of whatever kind or nature soever and the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof the said party of the first part shall and will forever warrant and defend.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year above written.

(Seal) ERASTUS E. EASTMAN.

Signed, Sealed and Delivered
in Presence of
Alex. W. Atkins.

124 Territory of Colorado,
County of Arapahoe—ss.

I, Alex W. Atkins, a notary public in and for said county in the territory aforesaid, do hereby certify that Erastus E. Eastman personally known to me as the person whose name is subscribed to the annexed deed appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this fourth day of January, A. D. 1866.

(Notarial Seal) ALEX. W. ATKINS,
Notary Public.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, clerk and recorder in and for said city and county of Denver, in the state aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 15 at page 177.

Witness my hand and official seal this 27" day of March, A. D. 1908.

(Seal City and County) ALBION K. VICKERY,
(of Denver.) Clerk and Recorder,
A. H. WILLIAMS, Dep.

(Stamped on margin) Examined.

(Written on margin) Internal Revenue stamp of $1 attached.

(Endorsed): Erastus E. Eastman to John W. Iliff Warranty Deed, Exhibit No. 3, Complt's Proofs, S. C. Hinsdale, Examiner.

Exhibit No. 4.
Complt's Proofs 2 pp.
S. C. Hinsdale, Examiner.

Land Patent United States
to
Erastus E. Eastman.

124a Filed for Record April 3d 1872, at 10-½ O'clock a. m.

W. D. ANTHONY, Recorder.

The United States of America, to all to whom these presents shall come—Greeting:

Whereas, in pursuance of the Act of Congress approved March 3, 1855, entitled An Act in addition to certain Acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States there has been deposited in the General Land Office Warrant No. 105577 for 160 acres in favor of Elmina Huestis, widow of Isaac Heustis, private Captain James Hayes Company New York Militia War 1812 with evidence that the same has been duly located upon.

The east half of the northwest quarter the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section twenty in township three south of range sixty seven west in the district of lands subject to sale at Denver City Colorado Territory containing one hundred and sixty acres according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General [General] the said warrant having been assigned by the said Elmina Huestis to Erastus E. Eastman in whose favor the said tract has been located. Now know ye that there is therefore granted by the United States unto the said Erastus E. Eastman as assignee as aforesaid and to his heirs the tract of land above described, to have and to hold the said tract of land with the appurtenances thereof unto the said Erastus E. Eastman as assignee as aforesaid and to his heirs and assigns forever.

In testimony whereof, I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the
125 first day of October in the year of our Lord one thousand eight hundred and sixty-seven and of the independence of the United States the ninety second.

(Seal)

By the President,
ANDREW JOHNSON.
By Frank Cowan, Sec'y.

J. N. Granger Recorder of the General Land Office. Recorded Vol. 233 Page 428.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, Clerk and Recorder, in and for said city and county of Denver, in the state aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 33 at page 581.

Witness my hand and official seal this 27" day of March, A. D. 1908.

ALBION K. VICKERY,
Clerk and Recorder.

(Seal City and County)
(of Denver.)

A. H. WILLIAMS,
Dep. Clerk and Recorder.

(Stamped on margin) Examined.

(Endorsed): U. S. Patent to Erastus E. Eastman. Exhibit No. 4, Complt's. Proofs, S. C. Hinsdale, Examiner.

Exhibit No. 5, Complt's Proofs, 2 pp.

S. C. Hinsdale, Examiner.

Lis pendens, Andy M. Adams, vs. Elizabeth Warren et al. Filed for Record at 4:35 O'clock p. m. Dec. 15" 1890. Jos. H. Smith, Recorder.

State of Colorado,
County of Arapahoe—ss.

In the District court for said county.

Andy M. Adams, Plaintiff,
against Lis Pendens.
Elizabeth Warren, Willie S. Iliff, Edna Iliff and Louise Iliff, Defendants.

126 To the above named defendants and to all whom it may concern:

Know ye: That the said Andy M. Adams has this day filed in the district court of Arapahoe county Colorado his complaint as against Elizabeth Warren, Willie S. Iliff, Edna Iliff and Louise Iliff, claiming that he the said plaintiff is the absolute owner in fee of the east half of the northwest quarter and the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section 20 township 3, south of range 67 west all in Arapahoe county Colorado:

And alleges in said complaint that the deed made by Erastus E. Eastman to John W. Iliff on the 4th day of January, 1867, and recorded in the records of Arapahoe county on the 12th day of July, 1867, was made to said John W. Iliff for the use and benefit of this plaintiff: that this plaintiff paid the entire consideration moving to said Eastman for said conveyance, and that the said Iliff received said title in trust for the use and benefit of plaintiff, and that all the defendants as heirs of said Iliff are bound by the terms of said trust, and praying said court to decree the said Andy M. Adams to be the absolute owner in fee simple of the lands aforesaid.

Dated this 15th day of December, A. D. 1890.

STUART BROS. & ANDREWS,
Attorneys for Plaintiff, Andy M. Adams, Plaintiff.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, clerk and recorder, in and for said city and county of Denver, in the state aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 649 at page 293.

Witness my hand and official seal this 26" day of March A. D. 1908.

(Seal City and County of Denver.)

ALBION K. VICKERY,
Clerk and Recorder.
A. H. WILLIAMS, Dep.

127 (Stamped on margin) Examined.

(Endorsed) Andy M. Adams vs. Elizabeth Warren et al. Lis Pendens. Exhibit No. 5, Complt's. Proofs, S. C. Hinsdale, Examiner.

Exhibit No. 6, Complt's. Proofs, 4 pp. S. C. Hinsdale, Examiner.

Order of Court Andy M. Adams, vs. Elizabeth Warren et al. Filed for record at 4.15 o'clock p. m. June 12, 1894. R. Le Bert, Recorder.

District Court, County of Arapahoe, Second Judicial District.

State or Colorado,
County of Arapahoe—ss.

Pleas in the District Court of Arapahoe County, State of Colorado, in the first Division thereof, before the Hon. George W. Allen, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County, on the second Tuesday (it being the 12th day of April, A. D. one thousand eight hundred and ninety two.

Present: Hon. George W. Allen, one of the Judges of the District Court, Robert W. Steel, Esq., District Attorney of said district, William K. Burchinell, Esq., Sheriff of said County, Matt Adams, Esq., Clerk of said Court.

District Court, County of Arapahoe.

Andy M. Adams,
13782. vs.
Elizabeth Warren et al.

Be it remembered, that heretofore, and on to-wit, the 1st day of July, A. D 1892, the same being one of the regular juridical days of the April term, 1892, of said court, the following proceedings, inter alia, were had and entered of record in said court, to-wit:

128 Andy M. Adams,
vs. Relief.
Elizabeth Warren, Willie S. Iliff, Edna Iliff and Louise Iliff.

Now on this first day of July, 1892, the above cause having been heretofore finally submitted to the court upon the pleadings, evidence and argument of counsel, the plaintiff appearing in person and by his attorneys Stuart Murray and Andrews and E. E. Edwards, and the defendants appearing in person and by their attorneys Wells, Macon and Furman, and the said Edna Iliff, and Louise Iliff also appearing by their Guardian Elizabeth Warren and the Court being fully advised in the premises, doth find; that the equities of this cause are with the plaintiff and against the defendants and that the allegations of the plaintiffs complaint are true, and that the defenses of the defendants set up in their said answers and each of them have not been sustained, and cannot prevail. And the court doth further specially find that the said John W. Iliff, named in the complaint, took the title of the lands in controversy to-wit: the east one half of the northwest quarter (¼) and the northeast quarter (¼) of the southwest quarter (¼) and the northwest quarter of the southeast quarter of section twenty (20), township

(3) three south of range sixty seven (67) west of the sixth principal meridian, all in Arapahoe County, State of Colorado, on the 4th day of January, A. D. 1867, by deed from Erastus E. Eastman of said date, and that the plaintiff, Andy M. Adams paid the full and entire consideration moving to the said Eastman for said conveyance; and that the said John W. Iliff took no beneficial interest in said estate by virtue of said conveyance, but received and held the same during his lifetime solely in trust for the plaintiff as alleged and set forth in plaintiffs complaint and reply herein.

And the Court doth further find that an account of plaintiffs insanity and as alleged and set forth in his said pleadings; that no laches can be attributed to him, neither has the Statute of Limitations run against or barred his action herein.

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It is therefore ordered, adjudged and decreed, by the court, that the said John W. Iliff took and held said lands in trust for the plaintiff as heretofore found by the court, up to the time of his death, and that the said defendants as his sole heirs at law, claiming said land by descent, are also charged with all the equities of the plaintiff in and to said land, and that the said plaintiff as against said defendants and each of them, is the true and equitable owner of said land and all of it. And it is further adjudged and decreed by the court that the plaintiffs title in and to said land, to-wit, the east one half of the northwest quarter and the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section twenty (20), township three (3), south of range sixty seven (67) west, of the sixth (6) principal meridian in Arapahoe county, Colorado, be and the same is hereby established in the plaintiff Andy M. Adams as the true owner thereof; and the title thereto quieted in him as against all claims whatsoever of the defendants or either of them, and this decree shall operate as a conveyance of all and any legal interest or title or seeming legal interest or title that may have descended to the defendants or either of them, and each of them, or apparently descended to them or either of them as heirs at law of the said John W. Iliff by any claim or seeming claim that he said John W. Iliff may at any time during his lifetime have held against said land or in said land or any part thereof.

It is further adjudged and decreed that the plaintiff have and recover of and from the defendants herein his costs, to all of which the defendants at the time excepted and prayed for an appeal herein, which is allowed by the Court, and ten days given in which to file an appeal bond, in the sum of one thousand dols.

the same to be approved by the Clerk of this Court. And 120 days is given the defendants in which to file their bill of exceptions herein.

By the Court,

GEO. W. ALLEN, Judge.

130 State of Colorado,
County of Arapahoe—ss.

I, Matt Adams, Clerk of the District Court of Arapahoe County State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of a certain order of court had and entered of record in a certain cause in said court lately depending, wherein Andy M. Adams was plaintiff, and Elizabeth Warren et al was defendant, as the same now remains on file and of record in this office.

Witness my hand and seal of said Court, at the Court House in Denver, County and State aforesaid, this 12th day of June, A. D. 1894.

(Official Seal)

MATT ADAMS, Clerk,
By G. S. Richards, Deputy Clerk.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, Clerk and Recorder in and for said City and County of Denver, in the State aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 987 at page 115.

Witness my hand and official seal this 27th day of March, A. D. 1908.

(Seal City and County of Denver.)

ALBION K. VICKERY,
Clerk and Recorder,
A. H. WILLIAMS, Dep.

(Stamped on margin) Examined.

(Endorsed) Andy M. Adams vs. Elizabeth Warren, et al. Decree of Judge Allen. Exhibit No. 6, Complt's. Proofs, S. C. Hinsdale, Examiner.

131 District Court, City and County of Denver, Second Judicial District.

State of Colorado,
City and County of Denver—ss.

Exhibit No. 8, 5 pp. Complt's Proofs.

S. C. Hinsdale, Examiner.

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Fourth Division thereof, before the Hon. Calvin P. Butler one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County on the second Tuesday (it being the 11th day) of September A. D., One Thousand Nine Hundred.

Present:
Hon. Calvin P. Butler, one of the Judges of the District Court.
Booth M. Malone, Esq., District Attorney of said District.
Robert J. Jones Esq., Sheriff of said County.
Elias F. Dunlevy Esq., Clerk of said Court.

Be It Remembered, that heretofore, and on to-wit, the 27th day of December A. D. 1900, the same being one of the regular juridical days of the September Term 1900 of said Court, the following proceedings, inter alia, were had and entered of record in said court, to-wit:

Andy M. Adams,
No. 13782. vs.
Elizabeth Iliff Warren, William S. Iliff, Edna Iliff and Louise Iliff.

Relief.

On this 27th day of December in the year of our Lord nineteen hundred the same being one of the regular juridical days of the September Term, 1900 of the District Court of the Second Judicial District in and for the county of Arapahoe and State of Colorado, this cause coming on to be heard before the Honorable Calvin P. Butler one of the judges of said court, in open court in the Fourth Division thereof, upon the
132 application and motion of the above named defendants to substitute Kate Adams, Katherine O. Adams, Andrew M. Adams and William A. Adams as parties plaintiff in lieu and stead of the above named Andy M. Adams, deceased, and that an order be entered ascertaining and specifying the amount of taxes paid by said defendants or their ancestor upon the lands in the complaint herein mentioned, to-wit: The

East half (E. ½) of the North-west quarter (N. W. ¼), and the North-east quarter (N. E. ¼) of the South-west quarter (S. W. ¼), and the North-west quarter (N. W. ¼) of the South-east quarter (S. E. ¼) of Section Twenty (20), Township Three (3) South, Range Sixty-seven (67) West in the county of Arapahoe and state of Colorado, together with the interest thereon, as well as the costs incurred herein by the above named defendants in this case in the Supreme Court of this state and in this Court herein, and to fix some reasonable time within which said amounts shall be paid, and that upon the failure on the part of said plaintiffs to pay such sum within some reasonable time to be fixed by this court, the decree heretofore establishing the trust in said lands be set aside and the action of said plaintiff be dismissed.

And it appearing to the court now here that the above named Andy M. Adams departed this life in the month of July, in the year 1900, and the death of said Andy M. Adams having been duly suggested upon the records of this court, and it further appearing to this court that the said Kate Adams, Katherine O. Adams, Andrew M. Adams and William A. Adams are the only surviving heirs of the said Andy M. Adams, deceased, and that notice of this application has been personally served upon each of the above named heirs and also upon Thomas B. Stuart and Charles A. Murray, and also upon B. F. Hunter, Mary B. Cole, A. M. Andrews and George W. Harrison, claiming to have some interest in the subject matter of this litigation;

And it appearing to the Court that the amount of taxes heretofore expended by the above named defendants and
133 their ancestor upon said lands, together with interest thereon to this date, and together also with the costs incurred herein by the above named defendants in the Supreme Court of this state as well as in this court in this case, is the gross sum of Thirty-seven Hundred and Ninety-seven dollars and Forty-two cents ($3797.42).

And the Court having heard the argument of counsel herein and being now fully advised in the premises, doth order, adjudge and decree that the above named plaintiffs pay to the above named defendants the said sum of $3797.42 on or before ninety (90) days from this date, and upon failure so to do, the decree heretofore rendered in this court establishing the trust in said lands be set aside, and the action of said plaintiff in that behalf be dismissed.

CALVIN P. BUTLER, Judge.

State of Colorado,
City and County of Denver—ss.

I, Perry A. Clay, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Decree of Court had and entered of record in a certain cause in said Court lately depending wherein Andy M. Adams was Plaintiff and Elizabeth Iliff Warren et al were Defendants, as the same now remains on file, and of record in this office.

Witness my hand and seal of said Court, at the Court House in Denver, County and State aforesaid, this 26th day of March, A. D. 1908.

Seal
District Court,
City and County of
Denver, Colorado.

PERRY A. CLAY, Clerk.

Endorsed: No. 13782. Exhibit No. 8 Complt's Proofs. S. C. Hinsdale, Examiner. Andy M. Adams, Plaintiff, vs. Elizabeth Iliff Warren et al. Defendant. Decree of Judge Butler in the tax accounting. District Court, Denver, Colo. Perry A. Clay, Clerk.

134 Exhibit No. 9, 5 pp. Complt's Proofs.
S. C. Hinsdale, Examiner.

State of Colorado,
County of Arapahoe—ss.

In the District Court.

Andy M. Adams, Plaintiff,
No. 13782. vs.
Elizabeth Iliff-Warren, et al., Defendants.

Petition.

Come now Thomas B. Stuart and Charles A. Murray and respectfully represent to the Court that they are parties in interest in this controversy by reason of the fact that they hold deeds for certain undivided interests in the lands involved herein, to-wit, the E. ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of section 20, township 3, south of range 67 west, in Arapahoe County, Colorado. That said conveyances were made to them by the plaintiff, Andy M. Adams, after the title to said lands was confirmed in the said Adams by the original decree of this Court, and afterward affirmed by the Supreme Court of the State of Colorado. That the interest of these petitioners in said lands

were conveyed to them by the said Adams in consideration of legal services rendered by petitioner to said Adams in this litigation, and amounting in value to several thousand dollars. That petitioners took said conveyances in satisfaction of their said claim for services, without any knowledge whatever that the above named defendants had any further interest or claim of any kind or nature in or to said lands or to any portion of the same, and that petitioners have for several years paid taxes on the said interests in good faith, believing that they were absolute owners of the same.

Upon the entry of the order and decree of December 27, 1900, requiring the payment to the defendants above named of the sum of $3797.42, petitioners immediately noti-
135 fied in writing their co-owners of said land to-wit: Mary B. Cole, B. F. Hunter, A. M. Andrews and G. W. Harrison, the said Harrison representing the entire interest of the original plaintiff, Andy M. Adams, and of his heirs in said lands, by virtue of a mortgage thereon held by the said Harrison, and in and by said notices informed said parties of the action of the said Court in entering the said order, and of the time fixed thereby for the payment of said money. That petitioners have since that time urged upon said parties, and especially upon the said G. W. Harrison, the necessity of protecting their interests in said land by providing for the payment of their share of said money, but that none of said parties have shown any intention of taking any steps whatever toward such protection. That the petitioners have waited until this late date in the hope that said parties would come in and protect their said interests, but that none of them have made any arrangements to that end, so far as petitioners can learn and believe.

Petitioners further respectfully represent that they finally on Saturday, the 23rd day of March 1901, made a tender to the above named defendants, by and through their attorneys of record, of the entire amount of $3797.42, and then and there demanded in writing that the said defendants should transfer, assign and set over to these petitioners the said order and decree of December 27, 1900, and all their right, title and interest in and to said lands by virtue of the same. That the said defendants, through their said attorneys, at that time refused to accept said tender and make the said transfer and assignment.

And petitioners further represent that by the terms of said order of December 27, 1900, unless the said money be paid to the said defendants on or before the 27th day of March 1901,

the said lands and all the title thereto will revert to the said defendants, and all the right, title and interest of the petitioners therein will be thereby utterly blotted out. That some of the said parties who hold interests in said lands under the said Adams are, as petitioners are informed and believe,
136 insolvent and are wholly unable to repay these petitioners any of the monies which might be paid for their benefit, and that petitioners have no protection, either legal or equitable in the premises, except by appealing to the equity powers of this Court for the orders hereinafter prayed for.

Petitioners further represent that they now bring into open Court and offer to pay to defendants above named the said entire sum of $3797.42 upon the assignment by them to the petitioners of the said order and decree of December 27, 1900, and of all their rights and interest in and to the said lands by virtue of the same, or upon a further order of this Court modifying said decree and transferring to petitioners all rights of the said defendants aforesaid.

Wherefore, the petitioners earnestly pray for an order and decree of the Court directing the said defendants above named to accept the said money from the petitioners and assign to petitioners the said order and decree of December 27, 1900, and all their rights under and by virtue of the same, and that the Court will make such further order and decree as may be proper in view of the premises to the full protection of the petitioners in the matters herein set forth.

THOMAS B. STUART,
CHARLES A. MURRAY.

State of Colorado,
County of Arapahoe—ss.

Charles A. Murray, being duly sworn, upon their oath say that they are the petitioners above named; that they have read the foregoing petition and know the contents thereof: and that the same is true of their own knowledge, excepting as to the matters therein stated upon information and belief, which matters they believe to be true.

CHARLES A. MURRAY.

137 Subscribed in my presence and sworn to before me this 25th day of March 1901.
My commission will expire April 26, 1901.

OTIS B. SPENCER,
Clerk of Court.
By M. J. Moore,
Deputy Clerk.

State of Colorado,
City and County of Denver—ss.

I, Perry A. Clay, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify that the above and foregoing copy of the Petition of Thomas B. Stuart and Charles A. Murray is copied from the "Abstract of Record" in case No. 5800, entitled George W. Harrison vs. Mary B. Cole et al, in the Supreme Court of the State of Colorado, and that the same is a true and correct copy of said petition as the same appears in said "Abstract of Record."

And I further certify that the said petition is copied from the "Abstract of Record" in case No. 5800 in the Supreme Court of the State of Colorado, for the reason that the original petition filed in this Court on the 25th day of March A. D. 1901, is not among the files in this office, and that I am unable to find the same.

Witness my hand and seal of said Court,
(Seal, District Court) at the Court House in Denver,
(City and County of) County and State aforesaid, this
(Denver, Colorado) 27th day of March A. D. 1908.

PERRY A. CLAY, Clerk.

(Endorsed) No. 13782. Exhibit No. 9 Complt's Proofs. S. C. Hinsdale, Examiner. Andy M. Adams, Plaintiff vs. Elizabeth Iliff-Warren et al. Defendant. Petition of Stuart & Murray to be subrogated to rights of defendants, upon payment of taxes. District Court Denver, Colo. Perry A. Clay, Clerk.

138 District Court, City and County of Denver. Second Judicial District.

Exhibit No. 10, 5pp. Complt's Proofs.

S. C. HINSDALE, Examiner.

State of Colorado,
City and County of Denver—ss.

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Fourth Division thereof, before the Hon. John I. Mullins one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County on the second Tuesday (it being the 8th day) of January A. D., One Thousand Nine Hundred and One.

Present: Hon. John I. Mullins, one of the Judges of the District Court.
Henry A. Lindsley Esq., District Attorney of said District.
Robert J. Jones Esq., Sheriff of said County.
Otis B. Spencer Esq., Clerk of said Court.

Be It Remembered, that heretofore and on to-wit, the 25th day of March A. D. 1901, the same being one of the regular juridical days of the January Term 1901 of said Court, the following proceedings, inter alia, were had and entered of record in the Judgment Book of said Court, to-wit:

Andy M. Adams,
No. 13782. vs. Relief.
Elizabeth Iliff-Warren, William S. Iliff, Edna Iliff, and Louise Iliff.

Now on this 25th day of March 1901, the same being one of the regular juridical days of the January Term, 1901, of the District Court within and for the Second Judicial District, County of Arapahoe and State of Colorado, this cause coming on to be heard before the Honorable John I. Mullins, one of the Judges of said Court, in open Court, upon the sworn petition and
139 application of Thomas B. Stuart and Charles A. Murray for an order and decree herein subrogating them as parties in interest upon the payment by them of the sum of $3797.42, the amount fixed by a previous order, judgment and decree of this court, entered herein on December 27, 1900, to all the right, title, claim and interest of the above named defendants, Elizabeth Iliff-Warren, William S. Iliff, Edna Iliff and Louise Iliff, under said order and decree, in and to the lands in controversy herein, the same being the E. ½ of the N. W. ¼ of the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of Section 20, Tp. 3 south, range 67 west, in the County of Arapahoe, and State of Colorado; the said petitioners appearing by Stuart & Murray, their attorneys, and the said defendants by Thomas Macon Esq., and Daniel Prescott Esq., their attorneys, and the Court having examined said petition and heard the evidence offered in support thereof, and the arguments of counsel and being duly advised in the premises, doth find the allegations thereof proven and true, and doth grant the prayer of said petition.

It Is Therefore now Hereby Ordered, Adjudged and Decreed by The Court, that the petitioners be, and they hereby become and are, subrogated to all the rights, title, claim and interests of the said defendants, Elizabeth Iliff-Warren, William S. Iliff, Edna Iliff, and Louise Iliff in, to and under the said order,

judgment and decree of this court entered herein on December 27, 1900, and all their right, title, interest and claim in and to said lands by virtue of said order, judgment and decree, the same being hereby modified to that extent. And it further appearing to the court that the said petitioners have paid to the clerk of this court by their certified check the full sum of thirty-seven hundred ninety seven and 42/100 ($3797.42) dollars for the use and benefit of said defendants.

It is Further Hereby Ordered, Adjudged and Decreed that said defendants do now assign, transfer and set over unto the petitioners the said judgment and decree of December 27, 1900, with all the right, title, and interest of the said defend-
140 ants therein, the said assignment to date and take effect from the date of this decree; and the said petitioners are now hereby held and declared to be the assignees of said judgment and decree of December 27, 1900, and the owners of all the right, title and interest of the defendants therein, and of all their claims thereunder.

It Is Further Ordered and Decreed that the said funds shall remain in the possession of the clerk of this court until the said defendants shall each and all have made and executed the assignment of the said judgment and decree of December 27, 1900, when the same shall be by the clerk paid over to them, or as they may then direct.

By the Court:
JOHN I. MULLINS, Judge.

State of Colorado,
City and County of Denver—ss.

I, Perry A. Clay, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Decree of Court hand and entered of record in a certain cause in said Court lately depending wherein Andy M. Adams was Plaintiff and Elizabeth Iliff-Warren et al were Defendants as the same now remains on file and of record in this office.

Witness my hand and seal of said Court,
(Seal, District Court) at the Court House in Denver,
(City and County of) County and State aforesaid, this
(Denver, Colorado) 26th day of March A. D. 1908.

PERRY A. CLAY, Clerk.

(Endorsed) No. 13782. Exhibit No. 10 Complt's Proofs. S. C. Hinsdale, Examiner. Andy M. Adams, Plaintiff vs. Elizabeth Iliff-Warren, et al, Defendant. Decree of Judge Mullins

in the Tax Accounting. District Court, Denver, Colo. Perry A. Clay, Clerk.

141 Exhibit No. 12, 2 pp. Complt's Proofs.

S. C. Hinsdale, Examiner.

Special Warranty Deed.

Andy M. Adams
To
C. O. Atkins

Filed for Record at 11:20 o'clock A. M. Jan. 23, 1892.

A. B. McGaffey, Recorder.

Know all men by these Presents: That I, Andy M. Adams of Arapahoe County, Colorado, for the consideration of One Hundred Dollars, to me paid, and for other good and valuable considerations, hereby sell and convey to C. O. Atkins of Arapahoe County, Colorado, the following real property, situated in Arapahoe County, State of Colorado, to-wit:

The Undivided One half of the following: The East half of the North West Quarter, and the North East quarter of the South West quarter and the North West quarter of the South East quarter of Section Twenty (20) Township three (3) South of Range Sixty Seven (67) West.

This conveyance is made to—as trustee to be by him held in trust for the use and benefit of the parties, and in the manner stipulated in certain articles of trust, signed in triplicate, one copy of which is herewith placed in the hands of said trustee, and bearing even date herewith, with all its appurtenances. And Warrant The Title to The same against all persons claiming under me. Signed and delivered this 21st day of January, 1892.

ANDY M. ADAMS.

State of Colorado,
Arapahoe County.

Andy M. Adams appeared before me this 21st day of January 1892, in person and acknowledged the foregoing instrument to be his act and deed for the uses specified therein.

142 Witness my hand and official seal.
My commission expires Nov. 20, 1895.

(Notarial Seal) ROBERT H. LATTA,
Notary Public in and for said County.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, Clerk and Recorder, in and for said City and County of Denver, in the State aforesaid, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy from the records of my office as the same appears in book 727 at page 391.

Witness my hand and official seal this 3rd day of April A. D. 1908.

ALBION K. VICKERY,
Clerk and Recorder.
(Seal, City and County)
(of Denver, Colorado.)
A. H. Williams, Dep.

Stamped on margin: Examined.

Endorsed: Exhibit No. 12 Complt's Proofs. S. C. Hinsdale, Examiner.

Exhibit No. 13, Complt's Proofs. 3 pp.

S. C. Hinsdale, Examiner.

Special Warranty Deed.

C. O. Atkins Trustee
To
T. B. Stuart et al

Filed for Record at 1:25 o'clock P. M., Mch. 23, 1897.

R. LeBert, Recorder.

This Deed, made this 27th day of February in the year of our Lord one thousand eight hundred and ninety four, between Charles O. Atkins, Trustee, of the County of Arapahoe, and State of Colorado, of the first part, and Thomas B.
143 Stuart, A. M. Andrews and Charles A. Murray of the County of Arapahoe and State of Colorado, of the second part:

Witnesseth, That the said part of the first part, for and in consideration of the sum of One dollar and other good and valid considerations, Dollars to the said party of the first part, in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell convey and confirm unto the said parties of the second part, their heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the County of Arapahoe, State of Colorado, to wit: The undivided one half (½) of the undivided one half

(½) of the East half (½) of the northwest quarter (N. W. ¼) and the north east quarter (N. E. ¼) of the south west quarter (S. W. ¼) and the north west quarter (N. W. ¼) of the south east quarter (S. E. ¼) of Section twenty (20) Township three (3) South of range sixty seven (67) west containing one hundred and sixty (160) acres. This deed is made in execution of a trust heretofore inposed upon me by virtue of a deed made by Andy M. Adams to me dated January 21, 1892 and recorded in book 727 page 391 of the Arapahoe County records and is aimed by me to rest title absolute in the grantees herein named as follows: The three eights of the property hereby conveyed to Thomas B. Stuart. The three-eights of the property hereby conveyed to A. M. Andrews and the two eights of the property hereby conveyed to Charles A. Murray.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances,

To Have And To Hold the said premises above bar-
144 gained and described, with the appurtenances, unto the said parties of the second part, their heirs and assigns forever. And the said Charles O. Atkins, Trustee, party of the first part, for him, heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, their heirs and assigns; that at the time of the ensealing and delivery of these presents he ha- good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid.

In Witness Whereof, The said party of the first part ha- hereunto set his hand and seal the day and year above written. Signed, Sealed and Delivered in the Presence of

(Printed Seal) C. O. ATKINS, Trustee.

State of Colorado,
County of Arapahoe—ss.

I, H. E. Singletary, a Notary Public in and for said County, in the State aforesaid, do hereby certify that C. O. Atkins, Trustee, personally known to me to be the person whose name is subscribed to the annexed Deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this sixth day of March A. D. 1894.

I further certify that my commission expires October 11th 1894.

(Notarial Seal) H. E. SINGLETARY,
Notary Public.

State of Colorado,
City and County of Denver—ss.

I, Albion K. Vickery, Clerk and Recorder in and for said City and County of Denver, in the State aforesaid, do hereby certify that the above and foregoing is a true, correct
145 and complete transcript and copy from the records of my office as the same appears in book 1149 at page 116.

Witness my hand and official seal this Third day of April, A. D. 1908.

(Seal, City and) ALBION K. VICKERY,
(County of Den-) Clerk and Recorder.
(ver, Colorado) A. H. WILLIAMS, Dep.

(Stamped on margin) Examined.

(Endorsed): Exhibit No. 13 Complt's Proofs. S. C. Hinsdale, Examiner.

Exhibit No. 14, Complt's Proofs. 3 pp.

S. C. Hinsdale, Examiner.

This Indenture, made this 25th day of March, 1901 by and between Elizabeth Iliff Warren, Williams S. Iliff and Louise Iliff, of the City and County of Denver, State of Colorado, and Edna Iliff Briggs of ....., parties of the first part, and Thomas B. Stuart and Charles A. Murray, of the City and County of Denver, State of Colorado, parties of the second part, Witnesseth;

That Whereas, on the first day of July, 1892, in the District Court of the Second Judicial District, in and for the then County of Arapahoe, and State of Colorado, in a cause then pending therein and numbered 13782, in which Andy M. Adams was plaintiff and the said Elizabeth Iliff Warren, William S. Iliff, Edna Iliff, (now Edna Iliff Briggs), and Louise Iliff were defendants, a decree was entered adjudging all of the following described lands, to-wit:

The East one half of the North West quarter, and the North East quarter of the South West quarter, and the North West quarter of the South East quarter, of Section Twenty, (20),

Township Three, (3), South of Range Sixty Seven, (67), West of the Sixth (6) Principal Meridian, all in Arapahoe County, (now the City and County of Denver) and State of Colorado, to be the property of the said plaintiff, and that John W. Iliff, through whom said defendants claimed title to said lands as his heirs at law, held the same in trust for the said plain-
146 tiff, Andy M. Adams, and quieting the title to said lands in said Andy M. Adams as against all claims whatsoever of said defendants, and each of them, in and to said lands, and

Whereas, thereafter, on the 27th day of December, 1900, a subsequent judgment and decree was entered in said cause in said court that the substituted plaintiffs therein pay to said defendants, within ninety days from the date thereof the sum of Three Thousand Seven Hundred Ninety Seven Dollars and Forty Two Cents ($3797.42), and upon failure so to do, the said previous decree establishing the said trust in said lands be set aside and the action of the said plaintiff to enforce said trust be dismissed, and

Whereas, thereafter, on the 25th day of March, 1901, in said cause a further order, judgment and decree was entered, subrogating the said Thomas B. Stuart and Charles A. Murray to all the right, title, claim and interest of the said defendants, Elizabeth Iliff Warren, William S. Iliff, Edna Iliff Briggs and Louise Iliff, in and to the said lands, and directing them, the said defendants, to assign, transfer and set over unto the said Thomas B. Stuart and Charles A. Murray the said judgment and decree of December 27th, 1900 with all the right, title and interest of the said defendants therein, and all their claims thereunder in and to said lands.

Now Therefore, in pursuance of the said order, judgment and decree of the Court, and for and in consideration of the payment by the said Thomas B. Stuart and Charles A. Murray to them of the said sum of Three Thousand Seven Hundred Ninety Seven Dollars and Forty Two Cents, ($3797.42), the receipt of which is hereby acknowledged, the said Elizabeth Iliff Warren, William S. Iliff, Edna Iliff Briggs and Louise Iliff do hereby assign, transfer and set over unto the said Thomas B. Stuart and Charles A. Murray the said judgment and decree of December 27th, 1900, and all their right, title and interest therein, and all their interest in and claim to the said lands thereunder, and all their right, title and interest to each and every part thereof.

In Witness Whereof, the said parties of the first part
147 hereunto set their hands and seals.

(Seal) ELIZABETH ILIFF WARREN,
(Seal) WILLIAM S. ILIFF,
(Seal) EDNA ILIFF BRIGGS,
(Seal) LOUISE ILIFF.

State of Colorado,
City & County of Denver.

Before me, the undersigned Notary Public, this day personally appeared the above named Elizabeth Iliff Warren, William S. Iliff and Louise Iliff, who subscribed their names to the foregoing instrument and assignment, and severally acknowledged that they signed, sealed and delivered the same as their free and voluntary act for the uses and purposes therein set forth.

Witness my hand and notarial seal this Twenty-fifth day of January, A. D. 1906. My commission expires April 21st, 1907.

FRED W. WEBBER,
Notary Public.

(Notarial Seal)

State of California,
City and County of San Francisco—ss.

Before me, the undersigned Notary Public, this day personally appeared the above named Edna Iliff Briggs, who subscribed her name to the foregoing instrument and assignment, and acknowledged that she signed, sealed and delivered the same as her free and voluntary act for the uses and purposes therein set forth.

Witness my hand and notarial seal this 31st day of May, A. D. 1906. My commission expires Sept. 19th, 1906.

MATTHEW BRADY.
Notary Public.

(Notarial Seal)

(Endorsed): Elizabeth I. Warren et al., to Thomas B. Stuart & Charles A. Murray. Assignment & Conveyance. Copy, recorded on records City and County of Denver, March 25, 1908 in Book 1971 Page 7. Exhibits No. 14 Complt's Proofs S. C. Hinsdale, Examiner.

148 Exhibit No. 15, Complt's Proofs.

S. C. Hinsdale, Examiner.

Arapahoe County,

Denver, Colo. 3/26/01.

To Otis B. Spencer, Dr. Clerk of the District Court.

Received from Stuart & Murray the sum of Three Thousand Seven Hundred & Ninty-seven Dollars & 42/100 by cashier check No. 4963 of the Denver Savings Bank.

OTIS B. SPENCER,
By M. J. Moore, Deputy Clerk.

Endorsed: Exhibit 15, Complt's Proofs. S. C. Hinsdale, Examiner. A. W. Harris, Kingston, Sierra Co. N. M.

Exhibit No. 16, Complt's Proofs.

S. C. Hinsdale, Examiner.

(Copy)

Declaratory Statement.

I, Erastus E. Eastman, of Arapahoe County, whose Post Office address is ....., Colorado, being over 21 years of age, the head of a family and a citizen of the United States, did, on the 18th day of June, A. D. 1866, settle and improve the E. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼, Section 20, Township 3 South, Range 67 West, in the Colorado Land District, containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry.

And I do hereby declare my intention to claim the said tract of land as a pre-emption right, under the provisions of the Act of September fourth, 1841.

Given under my hand this 18th day of June A. D. 1866.

(Signed) ERASTUS E. EASTMAN.

In the presence of G. M. Chilicott.

Endorsed on the back as follows: No. 2264 Erastus E. Eastman.

149 Endorsed: No. 4953. United States of America, District of Colorado, in the Circuit Court. Thomas B. Stuart and Charles A. Murray, Complainants, v. Union Pacific Railroad Company et al., Respondents. Complainants'

Exhibits. Filed June. 1, 1908. Charles W. Bishop, Clerk. S. C. Hinsdale, Examiner.

United States of America,
District of Colorado—ss.

In the Circuit Court.

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4953. vs. In Chancery.
Union Pacific Railroad Company, Defendant.

Testimony on Behalf of Defendant.

Be it Remembered, That on the 6th day of May, A. D. 1908, at the hour of 10:00 A. M. Pursuant to notice, said parties appeared before me, Sanford C. Hinsdale, an Examiner in Chancery of the Circuit Court of the United States for the District of Colorado, at my office, No. 803 Continental Building, Denver, Colorado, to-wit, the complainants in said cause appearing by Thomas B. Stuart, Esq., of the firm of Stuart & Murray, their solicitors, and the defendant appearing by C. C. Dorsey, Esq., of the firm of Dorsey & Hodges, its solicitors.

And on this day, and on the succeeding days to which this hearing was from time to time adjourned, came before
150 me also Elmer O. Davis, Alonzo F. Vick Roy, James Parks, Edwin Scrafford, Patrick J. McGill, Arthur W. Scribner, Leonard H. Eicholtz, Charles D. Ford, Harper M. Orahood and Edward L. Lafferty, witnesses of lawful age, to testify and the truth to say as witnesses on behalf of defendant in the suit and matter of controversy above mentioned and now pending and undetermined in said Court; and the said witnesses, having been by me first duly sworn according to law, to testify the truth, the whole truth and nothing but the truth in the matter and suit in controversy aforesaid, were examined by me on oral interrogatories propounded to them by counsel, as in their depositions following appears, that is to say:

Elmer O. Davis, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, occupation and place of residence?

A. Elmer O. Davis; instrument man of the Union Pacific.

Q. Where do you reside? A. 1716 16th Avenue.
Q. You reside in Denver, Colorado?
A. Denver, Colorado.
Q. What do you mean by instrument man—civil engineer?
A. I am a civil engineer.
Q. Is that your business or profession?
A. That is my profession.

Q. Mr. Davis, will you please examine the blueprint
151 which the Commissioner has marked Exhibit A and state what it is.

A. This is a map of the Union Pacific Railroad as constructed through section 20, township 3 south, range 67 west, and it is correct.

Q. Does this Exhibit A correctly show the location of the main track of the Union Pacific through the section you have mentioned? A. It does.

Q. Does it also correctly show the location of the objects on the ground in the vicinity of the track on this section?

A. It does.

Q. What is shown there by the space colored green and red on each side of the track?

A. The green is part of the right-of-way of the Union Pacific, leased to Mr. R. B. Horick and Lee Midgett.

Q. What does the red show?

A. The red shows the part of the Union Pacific railroad leased to Jacob Reudy.

Q. You say part of the Union Pacific railroad. You mean—
A. Right-of-way.
Q. To Jacob Reudy? A. R-u-d-y.

Q. How, if at all, have you designated on this blueprint the outer limits of a strip of land 400 feet in width, being 200 feet on each side of the center of the track?

A. By outside white lines on the outside of the green and the red.

Q. What is shown on this blueprint on either side of the main track and about 50 feet distant on either side, by the broken line and the round points?

A. These lines, 50 feet distant from the center of the
152 track, are fence lines as constructed. The circular points on this track are the telephone poles.

Q. Telephone or—
A. Telegraph poles owned by the Union Pacific.

Q. Have you examined this land yourself, the place where the track crosses section 20? A. I have.

Q. When did you make that examination?

A. On different occasions—(referring to memorandum) the 17th of March and the 29th of April.

Q. Were the fences and the telegraph line, which you have just mentioned, there at the time you made these examinations? A. They were.

Q. What kind of fences are these?

A. This is a four wire, barbed wire fence, with wooden posts.

Q. Does the fence on either side of the track extend clear across the section? A. It does not.

Q. How much of the section is covered by fences?

A. There is one road crossing about 100 feet wide where there is no fence.

Q. Otherwise than that does the fence extend—

A. Also a place about 100 feet on the east end that has no fence on the north side.

Q. How large are these breaks in the fence that you mention?

A. The break on the east end extends through the station of Sandown and extends on this section about 100 feet.

Q. About 100 feet on section 20?

A. On section 20. And the road crossing is about 100 feet.

153 Q. Are there any other breaks in the fences on this section? A. No, sir, there are not.

Q. What are the objects you have shown on your map as snow fences, or have you designated anything as snow fences?

A. The snow fences are shown by a crossed line.

Q. How extensive are they and what is their character and where are they located?

A. They are constructed of wood and are located at a distance from the center of the track varying from 144 feet to 157 feet.

Q. Which side of the track?

A. They are placed on the north side of the track.

Q. For how long a distance do they continue?

A. Approximately 2,900 feet. Have you a ruler?

Q. Is this map drawn to a scale, Mr. Davis?

A. It is drawn to a scale of 200 feet to the inch. (Ruler handed to witness) (Measuring) For 1,650 feet but not continuous, there is a snow fence.

Q. That is to say, 1,650 feet on this section 20?

A. On the section, in all, not counting breaks.

Q. Now, Mr. Davis, you have referred to the telegraph line and to the fences on either side and to the snow fence. Is there also a railroad track there? A. There is.

Q. What kind of a railroad track?

A. It is a standard gauge steam line.

154 Q. Is there more than one track?
A. There is just one track on section 20.
Q. What railroad is that part of?
A. Part of the Union Pacific railroad.
Q. What portion of the Union Pacific railroad?
A. The eastern division; the eastern district, Colorado Division.
Q. What do you mean by the eastern district, Colorado Division?
A. It is a length of track extending from Denver to Cheyenne Wells.
Q. Does it extend beyond Cheyenne Wells?
A. The eastern district in Colorado extends from Denver to Cheyenne Wells. The eastern district in Kansas extends from Cheyenne Wells to Ellis.
Q. Well, does the railroad stop at Ellis?
A. It extends to Kansas City.
Q. Then, this track to Cheyenne Wells, across section 20, is a part of the track extending from Denver to Kansas City?
A. It is.
Q. Is that the main track of the Union Pacific and its only line from Denver to Kansas City? A. It is.
Q. Who, if you know, maintains this railroad track, the snow fences, the telegraph line and the other fences which you have mentioned as extending through section 20?
A. The Union Pacific Railroad Company.
Q. Do they belong to that company?
A. They belong to that company.
Q. Are there any other objects belonging to that com-
155 pany or maintained by it located on section 20?
A. I believe there is none, but I am not positive as to that.
Q. With reference to the mile posts on the eastern district, or whatever you call this—what is this?
A. The eastern district in Colorado.
Q. With reference to the mile posts on the eastern district in Colorado of the Union Pacific Railroad Company, where is the point located at which this railroad line enters section 20 from the east, and where is the point located at which it departs from section 20 at the west?
A. It enters section 20 at 3,902 feet west of mile post No. 633. It leaves section 20, 3,995 feet west of mile post No. 634.
Q. How are these mile posts numbered—in a westerly direction from Kansas City toward Denver? A. Yes, sir.
Q. Do they begin at Kansas City?

A. They begin at Kansas City.

Q. When did you first see the railroad across section 20, and section 20?

A. You mean the first time I ever traveled over the road?

Q. Yes. A. In a car?

Q. Yes. A. It was in February of last year.

Q. When did you first make any examination on the ground of the portion of the line through section 20?

A. On the 17th of March, this year.

Q. State whether or not there is any indication on the
156 ground of said railroad ever having been located elsewhere in that neighborhood?

A. There are no indications of its ever having been constructed and moved to this location.

Mr. Stuart: The question and answer are objected to as merely speculative and calling for a conclusion.

Q. What is the character of the country embraced in section 20 there?

A. It might be called rolling with a steep grade coming down towards Denver.

Q. Is it open country? A. It is an open countrty.

Q. Prairie? A. Prairie exclusively.

Q. Is there any grading done and any cuts made for that portion of the railroad which runs through section 20?

A. None except the ones on which the track is located.

Q. Well, are there any on which the track is now located?

A. Is now located, there are.

Q. Are they extensive or otherwise?

Mr. Stuart: That is objected to as calling for a conclusion and not giving facts.

Q. Well, describe them in a general way. I will withdraw the previous question.

A. There is one cut or excavation on this mile that is approximately 4 feet deep. There is one fill that is probably 6 feet high, the embankment.

Q. Are there any other cuts or fills in that mile of track
157 on section 20?

A. None that amount to anything at all.

Q. How long are these that you mention?

A. The cut I should judge was half a mile long; the fill possibly a quarter.

Q. State whether or not throughout the section there is a bedding under the track?

A. There is no ballast, what we call ballast or bedding, under the ties.

Q. Is there not any earth or anything of that sort collected under the ties? A. It rests on earth entirely, the ties.

Q. Well, is the earth placed there artificially or is it in its original location? A. It is an artificial embankment.

Q. If this railroad had ever been constructed in any other location in that neighborhood, state whether or not traces would have been left of that fact?

Mr. Stuart: That is objected to as calling for a conclusion and opinion of the witness.

A. There would be a trace left if this had been constructed in any other place or if it had been desired to build the road in any other place; there would have been a trace, some trace, there would have been an embankment or fill at these two locations.

Q. Are there any such traces anywhere except where the road is now located and operated? A. There are not.

Cross Examination

By Mr. Stuart:

Q. Mr. Davis, this map shows leases to Jacob Reudy and P. B. Horick and Lee Midgett for quite a large portion of the claimed right-of-way. Have you such leases in your possession?

A. I have not.

158 Q. Have you ever seen them?

A. I have seen them.

Q. Can you furnish copies of them?

A. Not at present.

Q. Where are they?

A. There are copies in the division engineers' office, in the Union Depot.

Q. In Denver? A. In Denver.

Q. Do you know the date of these leases? A. I do not.

Q. How far is this fence and line of telegraph poles from the center of the track on each side thereof?

A. The fence is 50 feet on each side, the fences are 50 feet on each side.

Q. Of the center of the track?

A. Of the center of the track. The telegraph poles are 45 feet from the center of the track on the north side.

Q. And the balance of the claimed right-of-way of 400 feet has been leased, you say, by the defendant company to these different parties? A. It has.

Q. Do you know for what purpose it is leased?

A. I could not say just for what purposes this is leased.

Q. Do you know for what purpose it is being used by the parties who leased it? A. I don't.

Q. Do you know who these parties are, personally?
A. Personally I don't know them.
Q. You have been out there twice recently, so you say.
159 Do you see any visible use that these lessees are making of that property?
A. I don't with one exception. That is a little building located at this point you see on the map; it is located 607 feet west of mile post No. 634 at a distance of 156 feet to the nearest side of the house from the center line of the track. It is 40 feet long and 20 feet wide.
Q. The building? A. The building.
Q. What is it being used for?
A. It is being used for a saloon, called the Dew Drop Inn.
Q. Does your railroad company make a practice of leasing its right-of-way for saloon purposes?
A. As to that I can not say.
Q. Does this building belong to one of the lessees?
A. I do not know.
Q. Are there any other buildings or any other improvements on this land that you say has been leased?
A. Not on section 20.
Q. Will you please obtain and produce at the next sitting copies of these leases?

Mr. Dorsey: I will produce them if you want them. Mr. Davis probably can not come back at the next sitting.

Mr. Stuart: All right. On the promise of counsel to produce them, that will be satisfactory.

Mr. Dorsey: They are not in his custody. They are in the custody of his superior officer.

160 Mr. Dorsey: I now offer in evidence Exhibit A.

ELMER O. DAVIS.

Subscribed and sworn to before me this 20th day of May, 1908.

SANFORD C. HINSDALE, Examiner.

Mr. Dorsey: The defendant offers in evidence as Exhibit B, Act of Congress approved July 1, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of same for postal, military and other purposes," found in 12 U. S. Statutes at large, commencing at page 489.

As Exhibit C, defendant offers in evidence certified copy of certain original papers on file in the Interior Department.

It submits the original certified copy for the inspection of counsel and asks that a copy of the certified copy may be substituted therefor. The purpose of this exhibit is to show the acceptance of the Act of 1862.

Mr. Stuart: The complainants do not object to the Act of Congress above, on the ground that copy is not offered and that it is introduced simply by reference to the statutes, but they do object to said Act and Exhibit C, as being incompetent, immaterial and irrelevant. They consent that the copy offered shall take the place of the original certified copy of C.

161 Mr. Dorsey: The defendant offers in evidence as Exhibit D, the Act of Congress approved July 2, 1864, and entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of same for postal, military and other purposes,' approved July 1, 1862," found in 13 U. S. Statutes at large, commencing at page 356.

Mr. Stuart: I object to the evidence offered, not because it is introduced by reference to the statute, but because it is incompetent, immaterial and irrelevant to the issues in this case.

Mr. Dorsey: As Exhibit E defendant offers in evidence certified copies of the originals of certain papers on file in the Department of the Interior, for the purpose of showing the acceptance of said Act of 1864, and asks consent that, after inspection of the original certified copy, a copy of said certified copy may be substituted therefor as said Exhibit E.

Mr. Stuart: Exhibit E is objected to as incompetent, immaterial and irrelevant. It is consented that the orginal certified copy may be replaced by a copy thereof.

Mr. Dorsey: As Exhibit F, defendant offers in evidence an Act of Congress or resolution approved May 7, 1866, en-
162 titled, "A resolution extending the time for the completion of the Union Pacific Railway, Eastern Division," found in 14 U. S. Statutes at large, commencing at page 355.

Mr. Stuart: No objection is made to the introduction of this statute, or rather resolution, by simple reference to it. It is objected to, however, that it is not relevant to any issue in this case and is immaterial and incompetent.

Mr. Dorsey: As Exhibit G, defendant offers in evidence an Act of Congress approved July 3, 1866, and entitled, "An Act to amend an Act entitled 'An Act to aid in the construction

of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1, 1862," approved July 2, 1864," found in 14 U. S. Statutes at large, commencing at page 79.

Mr. Stuart: We have no objection to the introduction of this statute by reference to the same, but it is objected to that it is incompetent, immaterial and irrelevant as applied to the issues in this case.

Mr. Dorsey: As Exhibit H, defendant offers in evidence certified copies of certain original documents on file in the Department of the Interior, for the purpose of showing the fact of the filing of the map of general route as near as may
163 be in accordance with the purview of said Acts of Congress and for the purpose of thereby further showing the acceptance thereof by said railroad, and asks consent that the original certified copy, after inspection, may be returned to the defendant and a copy of said certified copy substituted therefor.

Mr. Stuart: Exhibit H is objected to, (1) as extra-official and extra-judicial in reference to the fact or facts aimed to be shown thereby; (2) no map is offered with the said exhibit showing any of the matters referred to in the letter; (3) it has been shown by prior evidence that no such map could be found; (4) the endorsement on said exhibit shows that said map was withdrawn some ten days after it was filed, and that it is not a record now in any office; further, that the said exhibit is incompetent, immaterial and irrelevant.

Mr. Dorsey: Well, you don't object to it because we offer a copy in place of the certified copies?

Mr. Stuart: No objection is made by the complainants that copy is offered in evidence.

Mr. Dorsey: Will the complainants consent, as before, that a copy of the certified copy may be substituted for the original certified copy?

Mr. Stuart: Yes.

Mr. Dorsey: As Exhibit I, defendant offers in evidence
164 Act of Congress approved March 3, 1869, entitled "An Act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railroad Company, to the Denver, Pacific Railway and Telegraph Company, and to expedite the completion of railroads

to Denver in the Territory of Colorado," found in 15 U. S. Statutes at large, commencing on page 324.

Mr. Stuart: No objection is made to the introduction of this statute by simple reference thereto. The evidence is objected to as being incompetent, immaterial and irrelevant.

Mr. Dorsey: As Exhibit J, defendant offers in evidence joint resolution of both houses of Congress, approved March 3, 1869, entitled, "Joint resolution authorizing the Union Pacific Railway Company, Eastern Division, to change its name to the 'Kansas Pacific Railway Company,'" found in 15 U. S. Statutes at large, commencing on page 348.

Mr. Stuart: No objection is made to the introduction of the resolution by simple reference thereto. The evidence is objected to as incompetent, immaterial and irrelevant.

Mr. Dorsey: As Exhibit K, defendant offers in evidence certified copies of certain documents on file in the Department of the Interior, intending to show thereby the accept-
165 ance by the United States of that portion of the railroad and telegraph line constructed by the Kansas Pacific Railway Company from the 393.945th mile to the 638.6 mile at Denver, Colorado, and asks consent that, after inspection of the original certified copy, it may be returned and a copy of said certified copy substituted therefor.

Mr. Stuart: No objection is made to a copy of the certified copy being substituted on inspection of same. It is objected, however, that the evidence offered is incompetent, irrelevant and immaterial; and, further, it states conclusions without giving copy of the report referred to.

Alonzo F. Vick Roy, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to [her] testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, place of residence and occupation?

A. A. F. Vick Roy; residence, Denver, Colorado; occupation, superintendent of Colorado Division, Union Pacific railroad.

Q. Mr. Vick Roy, how long have you been in the service of the Union Pacific Railroad Company and the companies which preceded it? A. 35 years.

166 Q. How long have you known the line of railroad now belonging to that company and extending from Kansas City to Denver? A. 35 years.

Q. Are you and have you during that period been familiar with that portion of said line extending across section 20, township 3 south, range 67 west?

A. Since 1876 I have been familiar with that part of it.

Q. When you first became acquainted with said line of railroad, what company was operating it?

A. Let me understand you, Mr. Dorsey. When I first became acquainted with the line or became connected with it?

Q. Well, in this year 1876.

A. I knew when it started its construction from Kansas City west in 1865. I was acquainted with it at that time.

Q. Well, when were you first over the line—in 1876?

A. No; in 1871.

Q. Do you know when that line was opened and first operated between Kansas City and Denver?

A. I came over it the following year. I am not positive just which year it was opened; I think it was opened in 1871, into Denver.

Q. And you became connected with it in 1876, did you?

A. In this territory, yes, sir.

Q. Do you know who was operating the line when you
167 first rode over it?

A. The Union Pacific Railway, Eastern Division, was the title of the road.

Q. Is that the same company that was afterwards called the Kansas Pacific Railway Company? A. It was.

Q. When did you first become connected with it as an employe? A. In 1868.

Q. At what locality? A. Wyandotte, Kansas.

Q. At that time the road had not been completed into Denver, had it? A. It had not.

Q. Were you familiar with this portion of the road between Kansas City and Denver, and particularly between the eastern boundary line of Colorado and the City of Denver, during the time of its construction? A. No, sir.

Q. You first saw that portion in 1871? A. Yes, sir.

Q. From 1871 on, were you familiar with that portion of the road lying between the eastern boundary of Colorado and the City of Denver?

A. No, sir, except as a passenger riding over the road.

Q. How frequently did you ride over the road?

A. About once a year during that time.

Q. Well, when did you first become familiar with it in the character of an employe of the Railroad Company?

A. Well, in this section of the country, I became familiar with it in 1876. Prior to that time my duties were on the east end of the railroad around Kansas City.

168 Q. And from 1876 on you have been familiar as an employe with this portion of the road?

A. I have, yes, sir.

Q. Will you examine Defendant's Exhibit A and state whether the portion of the railroad shown thereon is embraced within the portion lying between mile 393.945 and mile 638.6?

A. Yes, sir.

Q. How are the mile posts placed on this railroad with reference to the end at which they begin to be numbered?

A. They start from Kansas City and number westerly to Denver.

Q. Please state, Mr. Vick Roy, whether the line of railroad as located across section 20, township 3 south, range 67 west, and as shown upon the blueprint Defendant's Exhibit A, is in the same place now as shown upon that blueprint, as it was when you first saw it? A. It is.

Q. Between the time when you first saw it and the present time has its location ever been changed through section 20? A. It has not.

Q. Is this a part of the main line of the Kansas Pacific between Denver and Kansas City?

Mr. Stuart: That is objected to as calling for a conclusion.

A. It is. It is not the Kansas Pacific. I think Mr. Dorsey means the Union Pacific.

Q. Well, it used to be called the Kansas Pacific?

A. Oh, yes, yes.

169 Q. It is now owned and operated by the Union Pacific Railroad Company, the defendant herein?

A. Yes, sir.

Q. Has the Union Pacific Railroad Company, or any of its predecessors in title, including the Kansas Pacific Railway Company, otherwise known as the Union Pacific Railway Company, Eastern Division, otherwise known as the Leavenworth, Pawnee and Western Railroad Company, ever had any other line between Denver and Kansas City than the one described by you as crossing section 20, in this location?

Mr. Stuart: That is objected to as incompetent and as [as] calling for a conclusion and opinion of the witness.

A. It has not.

Q. Mr. Vick Roy, state whether or not from the time when you first knew this railroad until the present time it has been continuously operated as a railroad by Union Pacific Railroad Company, the present defendant, and its predecessors in title? A. It has been.

Q. How extensive has that operation been?

A. Do you mean the amount of business that has been transacted over the road?

Q. Have they run trains over it daily, passenger trains and freight trains?

A. They have with an occasional interruption on account of snow, blockades, washouts and wrecks that are incidental to the operation of a railroad.

Q. But, except for those unfortunate interruptions,
170 which were beyond their control, it has been continuously operated? A. It has been, yes, sir.

Q. And those interruptions were only such as occur on all railroads, were they? A. Exactly.

Q. Will you examine Exhibit A and state if you know how long the snow fences and the post and wire fence shown thereon have been there? A. I can't say.

Q. Can you say approximately?

Mr. Stuart: Well, if he can't say, why, I object to any speculation about it.

A. I don't think I can, Mr. Dorsey. They have been there a long time.

Q. Do you remember when you first saw them there?

A. The snow fences have been there, I am satisfied, more than 25 years, the barbed wire fence more than ten years.

It is agreed and stipulated on the record, between the complainants and the defendant, Union Pacific Railroad Company, that both of the complainants were at the time of the commencement of this action, and ever since have been, and now are, citizens and residents of the State of Colorado, and that the defendant, Union Pacific Railroad Company, was at the time of the commencement of this action, and ever since has been, and now is, a corporation organized and ex-
171 isting under the laws of the State of Utah and a citizen and resident of said State.

Q. Mr. Vick Roy, how long have you been in the railroad business? A. 35 years.

Q. Is your experience in that business of such a character, and have you had such dealings with railroad property, as to become familiar with the values of real estate, the use there-

of for railroad property and right-of-way and its value as railroad property and right-of-way? A. Yes, sir.

Q. Will you please state what is the value of a strip of land 400 feet in width, being 200 feet on each side of the center of the track of the Union Pacific Railroad Company, as it extends through section 20, township 3 south, range 67 west, as a strip of ground to be used as right-of-way for said railroad?

Mr. Stuart: I object—

(Question continued) I will simplify the question by stating that you may say that the value is not less than so and so.

Mr. Stuart: I oject because the witness has not shown he is acquainted with the value of this land.

A. Not less than $5,000.

Q. You may state, Mr. Vick Roy, what, if any, damage in amount would be done to Union Pacific Railroad Company, stating the amount is not less than so and so, if it were deprived of the ownership of the strip of ground for right-
172 of-way which I have described.

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

A. Not less than $5,000.

Q. Has your experience in the railroad business been such that you have become familiar with the cost of acquiring rights-of-way and of the values of rights-of-way and strips of ground used for that purpose along the line of the Union Pacific Railroad Company in Colorado, and in the particular location or in the neighborhood of section 20, township 3 south, range 67 west?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

A Yes, in a general way.

Q. Please state whether during your experience in the railroad business you have been connected with transactions and dealings of that sort, or they have been done under your supervision—

Mr. Stuart: Same objection as given last above.

(Question continued)—and, if so, to what extent?

Mr. Stuart: Same objection.

A. I have passed on several cases where it was necessary for our company to procure additional right-of-way, have passed on the prices that the land was offered for.

Q. Have you during your experience in the railroad
173 business known about such transactions, although not done by yourself or under your supervision?

Mr. Stuart: That is objected to for the same reason.

A. Yes, sir.

Q. State whether your estimates as to the minimum damage and minimum value, which you made in your testimony a few minutes ago, applies at the present time, and also would be true at the time of the commencement of this action on April 21, 1906, and continuously since that time?

Mr. Stuart: That is objected to, and all of the evidence of the witness upon the question of the value of this supposed right-of-way and damage to the company is objected to, and complainants move to strike it out, because none of it is based upon the cash value of the land either at the time it was taken or at this time, and the experience of the witness affords no legal measure of the value either as to the value of the land or the damage to the Railroad Company.

A. It does.

Cross Examination

By Mr. Stuart:

Q. Mr. Vick Roy, suppose that it should be found that the defendant had no right to any of this land except the 50 feet on each side of the center of its track that it, you say, has fenced in, what would be the value of that 100 feet in width according to the way you have heretofore estimated it, either at the time it was first occupied or at this time?

174 A. Of this 100 feet here (indicating on Exhibit A)?

Q. Yes.

Mr. Dorsey: That is objected to as not proper cross examination and immaterial and irrelevant.

A. I am not sure that I understand the question. I take the question to mean that, if the Railroad Company had instead of 400 feet right-of-way only 100 feet right-of-way, what the value of the 100 foot right-of-way would be with a railroad on it as it is at the present time, with the cuts and the fills and the bridges through that one mile of track.

Q. No. If you want to answer that way, I will have to ask another question. I say either at the time of taking or at this time.

A. At the time of taking? When they took the land originally?

Q. Yes, sir.

A. For a survey through there to put a railroad?

Q. Let me add to the question so that the witness will understand me. I am not asking you, Mr. Vick Roy, to take into consideration the value of the company's track, but the right-of-way through there at this time, at the time this suit was commenced, of 100 feet in width.

A. When was the suit commenced?

The Commissioner: April 21, 1906.

Mr. Dorsey: The question is objected to as not proper cross examination and immaterial and irrelevant.

(Witness continuing) In my judgment, as to the
175 value of the 100 foot right-of-way through there, as they have fenced in, as against the 400 foot right-of-way which they own, at the present time there is very little difference in the value. We are not at the present time making use of that part of it outside of the 100 foot limit for railway purposes.

Q. Your idea, then, would be, Mr. Vick Roy, that the 100 feet inside of your fences would have been worth to the Railroad Company at the time this suit was commenced, the date of which has been given, and at this time, $5,000, or as much as the 400 feet?

Mr. Dorsey: That is objected to as not proper cross examination, immaterial and irrelevant.

A. Practically.

Q. Mr. Vick Roy, might you not be mistaken in the length of time that the barbed wire fence has been upon the land in dispute as being ten days?

A. Yes, sir, I can be mistaken.

Q. What do you speak from—simply a general recollection?

A. Yes, sir. The supervisor of bridges and buildings and fences on our division is the man that looks after that detail.

Re-direct Examination

By Mr. Dorsey:

Mr. Dorsey: Just one question: I presume I should have asked it on direct examination, but, if you will allow me to do it now, I will appreciate the favor.

Mr. Stuart: Yes, sir. Go on.

176 Q. Mr. Vick Roy, please state if you know why these fences were placed on the 50 foot line instead of on the 200 foot line on each side of the track.

Mr. Stuart: That is objected to as being an argument and attempting to explain a matter of fact, as shown by the map.

A. The object was to give the people on the adjoining land an opportunity to cultivate that part of the right-of-way which was not at that time required for railroad purposes. That is my understanding of it, but I am not positive that that is the correct explanation. The order originated with the president of the railroad and it was our understanding at the time that that was the purpose of it.

Q. Do you know whether or not leases were made, not only here as shown on this blueprint, but elsewhere along the railroad, of the portion of the 400 foot right-of-way outside of these fences placed on the 50 foot line?

Mr. Stuart: That is objected to as being argumentative and immaterial, not relevant to this issue.

A. Yes, sir.

Q. Has that been the practice of the Union Pacific?

Mr. Stuart: Same objection, and incompetent also.

A. Yes, sir.

177 Re-cross Examination

By Mr. Stuart:

Q. Then, Mr. Vick Roy, if the complainants in this case were the owners of the land on each side of this railroad, your idea was to give them the privilege of cultivating 300 feet out of the 400 feet of your right-of-way, was it? A. Yes, sir.

Q. Have you got that letter from the president, or could you furnish a copy of it here? A. No, sir.

Q. You couldn't furnish a copy of it?

A. I don't think we could. I am not sure, however. It might be found in our records.

Q. Who is Jacob Reudy—do you know him? A. No, sir.

Q. Who is P. B. Horick and Lee Midgett—do you know them? A. I don't.

Q. Are any such men connected with your company that you know of? A. Not that I know of.

Q. Do you know how old these leases are? A. No, sir.

Q. Do you know of either of these parties ever claiming to be the owners of adjoining lands to your tract there?
A. No, sir.
Q. How long have you known that there was a saloon called the Dew Drop on your land, or within what you claim to be the right-of-way, Mr. Vick Roy?

Mr. Dorsey: That is objected to as not proper cross examination and as immaterial and irrelevant. He has not testified that he knew it at all.

(Question continued) Or did you ever know it?

178 Mr. Dorsey: Same objection.

A. I never knew that there was a saloon on our right-of-way at this point.
Q. Do you know whether Jacob Reudy or P. B. Horick or Lee Midgett are using any of this land that they claim to have a lease for? A. I do not.
Q. And therefore you do not know what purpose they leased it for, do you? A. No.

Direct Examination

By Mr. Dorsey:
Q. Mr. Vick Roy, when you stated that the purpose of your company in placing these fences at the 50 foot right-of-way was to allow owners of adjoining land to use and cultivate that part of the right-of-way outside of the 50 foot limit, did you mean by that that your purpose was to allow them to do it without leasing it, or by leasing it?

Mr. Stuart: That is objected to as leading, argumentative, incompetent, immaterial and irrelevant.

A. In every case by leasing it and paying a nominal rental. If they were trepassers, we notified them off.
Q. Well, Mr. Vick Roy, when you stated in your cross examination that at the present time the portion of the 400 foot right-of-way outside of the 50 foot fence was not used for railroad purposes, you meant that at present there were no
179 tracks or other railroad improvements upon it, didn't you?

Mr. Stuart: That is objected to as leading, argumentative, incompetent and asking the witness to interpret his own evidence.

A. Yes, sir.
Q. Did you or did you not by that answer mean to make any statement as to what the future might develop in regard to this portion of the right-of-way outside of the 50 foot fence?

Mr. Stuart: That is objected to as leading and incompetent. The answer speaks for itself.

A. No.

ALONZO F. VICK ROY.

Subscribed and sworn to before me this 21st day of May, 1908.

SANFORD C. HANSDALE,
Examiner.

James Parks, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, age, place of residence and occupation?

A. James Parks; supervisor of bridges and buildings on the Colorado Division, Union Pacific Railroad Company.

Q. What is your age? A. 62.

180 Q. Where do you reside?

A. At 3347 Boulevard F.

Q. Denver, Colorado? A. Yes, sir.

Q. How long have you been in charge of bridges and buildings for the Colorado Division, Union Pacific Railroad Company?

A. Why, I have been here since 1878; I came off the main line here, but I have been with the road since 1868.

Q. How long have you been familiar with that portion of what is now known as the Eastern District, Union Pacific Railroad Company, extending east from Denver in the direction of Kansas City, which runs across section 20, township 3 south, range 67 west, as shown on Exhibit A? A. Since 1898.

Q. Did you know it before that time? A. No sir.

Q. How did you happen to become acquainted with it then?

A. The road was turned over at that time to what they call the Colorado Division, as far as Cheyenne Wells.

Q. Since that time you have had charge of your department of that portion of the railroad, have you? A. Yes, sir.

Q. When you first took charge and first knew that portion of the railroad, was the wire fence in place on each side of the track as shown on Exhibit A? A. Yes, sir, it was.

Q. Were the snow fences in place on the north side of the track as shown on Exhibit A? A. Yes, sir.

181 Q. Have they been so continuously up to this time?

A. Yes, sir.

Q. Since the time you have mentioned who has maintained said fences and said snow fences? A. I have.

Q. For the Union Pacific?

A. For the Union Pacific, yes, sir.

Q. Have you during that period of time for the Union Pacific maintained any other structures upon that portion of the railroad or near it shown on Exhibit A? A. No, sir.

Q. No other structures there.

A. No other structures there that I remember.

Cross Examination

By Mr. Stuart:

Q. Do you remember, Mr. Parks, definitely in regard to this land in section 20, its condition in 1898, or are you speaking in reference to the land lying in that locality?

A. Well, to land lying in that locality and the right-of-way there. Of course I have traveled over the road very often and am quite familiar with it.

Q. Have you ever been off of the cars and on this particular tract of land, and if so, how often?

A. Yes, sir, I have been along there on inspection, had motor cars, and we have stopped at the bridges and culverts and all such work as that.

Q. And what was the earliest date of your making such travel, in the nature of looking after bridges and culverts?

A. Well, we started in right after taking the road in 1898 and we made one or two yearly inspections every year.

182 Q. That was confined mostly to bridges and culverts, wasn't it, Mr. Parks? A. Yes, sir.

Q. Portions of your right-of-way that were not fenced in 1898, have you been fencing it since that time?

A. No, sir; I have never put a fence in there. That fence has been there since 1898. It may have been repaired, and the snow fence I know has been, and the wire fence too, for that matter, where the posts were rotted off.

Q. But in passing over the land you have either been on the regular trains or been on a car, a hand car, or something of that kind?

A. Yes, sir, that is generally the way we get over on those inspections, but we stop at all culverts and bridges.

Q. There are no culverts and bridges on this land, are there, Mr. Parks? A. Well, I really couldn't say.

Q. Well, your plat there don't indicate any?

A. No; I don't think it shows any (looking at Exhibit A).

JAMES PARKS.

Subscribed and sworn to before me this 23 day of May, 1908.

SANFORD C. HINSDALE, Examiner.

Mr. Dorsey: I would like to file in connection with this testimony and before we close the following written stipulation.

183 (See stipulation next attached.)

Thereupon the hearing was adjourned until May 7, 1908, at 10 a. m.

In the Circuit Court of the United States for the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4953. vs. In Equity.
Union Pacific Railroad Company, Defendants.

Stipulation.

It Is Hereby Stipulated And Agreed, By and between the complainants and the defendants, Union Pacific Railroad Company:

First: That the defendant, Union Pacific Railroad Company, as successor in title to The Kansas Pacific Railway Company, acquired and became possessed, before the bringing of this action, of all of the property and all right-of-way and railroad track of said The Kansas Pacific Railway Company, (previously known as Union Pacific Railway Company, Eastern Division, and before that as The Leavenworth, Pawnee and Western Railroad Company) held by it, The K. P. Ry. Co. by virtue of any and all the acts of Congress specified in the answer herein.

Second: The defendant, Union Pacific Railroad Company, has and hereby does withdraw its objection to the tes-
184 timony of Thomas B. Stuart herein, in reference to an action brought by George W. Harrison, and in which Thomas B. Stuart and Charles A. Murray filed a cross-complaint; and further withdraws its motion to strike the same, in so far as said objection and said motion is based upon the fact that said testimony is not the best evidence, and is for that reason incompetent, retaining, however the said objection and the said motion, in so far as it is based on the contention that the testimony is immaterial and irrelevant; said testimony, said motion and said objection are to be found on pages

4 and 5 of the transcript of the testimony of said Thomas B. Stuart.

THOMAS B. STUART and
CHARLES A. MURRAY,
Solicitors for Complainants.

C. C. DORSEY, W. V. HODGES,
Solicitors for Defendant, Union Pacific Railroad Company.

(Endorsed): In Equity, No. 4953. In the circuit court of the U. S. for dist. of Colo. Thomas B. Stuart and Charles A. Murray, Complainants, vs. Union Pacific R. R. Co., Defendants. Stipulation. Dorsey & Hodges, Attorneys for defendants.

May 7, 1908, 10:00 A. M.

Said parties met pursuant to adjournment. Present, Messrs. Stuart, Murray and Dorsey. Thereupon the following proceedings were had:

185 Edwin Scrafford, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your occupation and where do you reside, Mr. Scrafford?

A. I am a locomotive engineer for the Union Pacific; 2448 Stout Street.

Q. Denver? A. Denver.

Q. How long have you been a locomotive engineer?

A. Since '70.

Q. Since 1870? A. Yes, sir.

Q. What was your occupation prior to 1870?

A. Fireman.

Q. Locomotive fireman? A. Yes, sir.

Q. In the service of what companies have you been employed as locomotive fireman and locomotive engineer?

A. Union Pacific, Kansas Pacific, Oregon Northwestern and a short time on the Burlington.

Q. When did you enter the employ of the Kansas Pacific?

A. The 15th day of June, 1869.

Q. Since that time have you been continuously in the employment of the Kansas Pacific and Union Pacific?

A. Yes, sir.

Q. Are you so today? A. Yes, sir.

Q. When did you first run over that portion of the
186 Kansas Pacific Company's line leading eastwardly from Denver to the state line between Colorado and Kansas?

A. Well, I should say it might have been the latter part of November, but I would say the first part of December, 1871. I was two or three days getting up here.

Q. Since the time when you first ran over that portion of the Kansas Pacific Railroad Company's line, state whether or not you have subsequently gone over it, and, if so, how often?

A. Well, I have averaged to go over it once a day since that time.

Q. Since 1871? A. Since '71, yes.

Q. Is that your run now? A. Yes.

Q. Are you familiar with that portion of said line of railroad which extends through section 20, township 3 south, range 67 west, being the same portion which lies eastwardly and westwardly from mile post No. 634 as shown on the map Exhibit A?

A. These mile posts I am very familiar with and understand this piece of track, if this represents the west end of the Kansas Pacific between mile posts '34 and '34½.

Q. 634 and 634½? A. Yes, sir.

Q. To make it more exact, are you familiar with that portion of the track which lies between mile posts Nos. 633 and 635?

A. Yes, sir, I am very familiar with that portion of the track.

Q. Are you familiar with that portion of the track
187 which lies directly west or immediately west of the station of Sandown and extends west from the west switch at Sandown for a distance of about a mile?

A. I am, yes, sir.

Q. Where is Sandown located with reference to mile post No. 634? A. Just east of 634.

Q. About how far east of mile post 634 is the west switch at Sandown?

A. Well, now, I couldn't exactly say whether it is a quarter of a mile; I don't just remember how many telegraph poles between mile post No. 634 and the west switch at Sandown.

Q. Well, approximately?

A. Well, it might be a quarter of a mile.

Q. It is about that, is it? A. I think. I wouldn't—

Q. How recently have you gone over this portion of the track? A. I came over it day before yesterday.

Q. State whether or not this portion of the main track is now in the same location that it was on the day when you first went over it in November or December, 1871?

A. It is. It has never been changed to my knowledge and it really couldn't be changed without me knowing it.

Cross Examination Waived.

EDWIN SCRAFFORD.

Subscribed and sworn to before me this 18th day of May, 1908.

SANFORD C. HINSDALE, Examiner.

188 Patrick J. McGill, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, Mr. McGill?

A. Patrick J. McGill.

Q. Where do you reside? A. 1470 Filmore, Denver.

Q. What is your occupation?

A. Locomotive engineer on the Union Pacific.

Q. In the employ of the Union Pacific Railroad Company?

A. Yes, sir.

Q. How long have you been a locomotive engineer?

A. I commenced running in November, 1871, run my first trip.

Q. What was your occupation before November, 1871?

A. Fireman.

Q. Locomotive fireman? A. Yes, sir.

Q. When did you begin the business of locomotive fireman?

A. On the Union Pacific—on the Kansas Pacific in October, 1869.

Q. Since you entered the employ of the Kansas Pacific in October, 1869, in the employ of what railroads have you been?

A. None other but the Union Pacific.

Q. The Kansas Pacific and—

A. The Union Pacific, yes, sir.

Q. And its successors including the Union Pacific—is that correct? A. Yes, sir.

189 Q. Have you during that time continuously been engaged as a locomotive fireman and engineer up to the present time? A. Yes, sir.

Q. When did you first run over the track formerly belonging to the Kansas Pacific and extending eastwardly from Denver to the state line between Colorado and Kansas?

A. We arrived here in August, 1870; the 20th of August, 1870, I think it was.

Q. Since the month of August in 1870 how frequently have you run over that portion of the line extending eastwardly from Denver beyond what is now the station of Sandown?

A. Well, with the exception of about four years, I was on the Las Animas branch of the Kansas Pacific and about three years between Hugo and Wallace, I averaged over the road about once a day. Our run is now—we go over the road, make ten trips; that would be twenty times each way over the road; I mean double the road ten times each trip.

Q. During the times when your regular run was not over this portion of the road as you have described, did you at any time travel over it?

A. Why, I averaged about once a month, came up with my engine to get repairs done and work of that kind, sometimes oftener than that, but averaged about once a month.

Q. In these trips you have described did you pass over that portion of said railroad which lies within section 20, township 3, south, range 67 west, being the portion of the road which lies between mile posts Nos. 633 and 635?

A. Yes, sir.

Q. Do you know where the station of Sandown is?

A. Yes, sir.

190 Q. Where is that located with reference to mile post No. 634?

A. I would judge it is about eight telegraph pole lengths east of '34.

Q. Well, about how far is that?

A. Well, about a quarter of a mile.

Q. Will you examine Exhibit A and after making such examination state where the west switch at Sandown is located on said map.

A. Well, just about a quarter of a mile east of mile post No. 634, I would judge.

Q. And where is that located with reference to the white line running north and south at the extreme east end of this map?

A. Why, I would say the switch is about a telegraph pole length, may be, east of this line, this end line.

Q. Then the switch at Sandown is just about at that line, isn't it? A. Yes, sir.

Q. The particular portion of the track, then, to which I would call your attention is that part which extends westwardly, for a distance of one mile and a little over, from the west switch at Sandown, and I would ask you with respect to that portion of the track whether or not it is now in the same location as it was when you first passed over it?

A. Yes, sir; there has never been no change.

Q. Has it always been in that same location?

A. Yes, sir.

191 Q. State whether or not during the period of time to which you refer it has been operated as a railroad and trains run over it?

A. Well, it has always been operated as a railroad—since they started to build out here in June, 1870, they had to go over that portion of the road.

Q. Now I will ask you with reference to that portion of the line extending from mile post No. 635 to mile post No. 633. As to that portion of the line, will you please state whether it is now in the same position as it was when you first saw it? A. Yes, sir.

Q. When you first passed over it? A. Just the same.

Q. Has there ever been any change in its location?

A. No, sir. The only change that has ever been made up in there is putting in that side-track.

Q. What side-track? A. At Sandown.

Q. The side-track at Sandown does not appear on this map that you are looking at there, does it (Exhibit A)?

A. No.

Q. That portion of the track where the side-track at Sandown has been constructed is not shown on that map, is it?

A. No, I don't think it is.

Cross Examination waived.

PATRICK J. McGILL.

Thereupon the hearing was adjourned until May 9, 1908, at 10:00 a. m.

192 May 9, 1908. 10:00 A. M.

Said parties met pursuant to adjournment; present as before. Thereupon the following proceedings were had:

Arthur W. Scribner, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, age and occupation?

A. Arthur W. Scribner; age 53, occupation, tax commissioner of the Union Pacific Railroad Company.

Q. Where do you reside? A. In Omaha, Nebraska.

Q. How long have you been tax commissioner for the Union Pacific Railroad Company and its predecessor companies?

A. Since the year 1891, commencing in the year 1891.

Q. During the period since 1891 has it been part of your business to look after the taxes on that portion of the Union Pacific railroad extending from Denver in an easterly direction to Kansas City, formerly known as the Kansas Pacific railway? A. Yes, sir.

Q. Have you had charge of the assessments and the taxation of and the payment of the taxes upon that portion of the Union Pacific line of railroad last mentioned, extending easterly from Denver to Kansas City, between mile posts Nos. 635 and 633? A. Yes, sir.

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Q. And that has been true of the entire period since 1891?

A. Yes, sir.

Q. During that period what, if any, returns to the State Board of Equalization have you made of the railroad and right of way between said mile posts?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

Mr. Dorsey: Do you object to it because it is not the best evidence or do you wish that?

Mr. Stuart: I do not wish to cause you, Mr. Dorsey, any inconvenience by introducing the return itself, but I do not like to have the witness put his construction upon some act that he has done. I would like to see it at the same time, or see one of them, to know exactly what he has done, to know whether he is right in his construction of it.

A. From the year 1891 to the year 1901, inclusive, returns were made of the railroad mileage of main line from Denver east to the Kansas line. Commencing with 1902, for greater certainty, we have included in our returns to the State Board the acreage of the right-of-way in each county crossed by the line of railroad referred to.

Q. Prior to 1902 did your returns make any reference by name or otherwise to the right-of-way?

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A. Only as the blanks furnished by the State Board called for a return of the railroad mileage including main track, road-bed and right-of-way.

Q. And to that you answered so many miles, did you?

A. Yes, sir.

Mr. Stuart: Don't lead him, Mr. Dorsey.

Q. Since 1902 you say that you have stated in your returns the acreage in each county crossed by said line of railroad? A. Yes, sir.

Q. Do you know in what county or counties that portion of the railroad shown on map Exhibit A and lying between mile posts Nos. 635 and 633 has been since 1902?

A. Up to the time of the division of old Arapahoe county this railroad was in Arapahoe county; since the time of the division it has been in the City and County of Denver.

Q. In your returns of mileage and right-of-way of this line of railroad, since 1902, as to the old Arapahoe county prior to the division and as to the new City and County of Denver since the division, have you stated the acreage embraced in the right-of-way? A. Yes, sir.

Q. State whether or not in computing that acreage and returning it to the State Board of Equalization, you have included for a right-of-way through section 20, township 3 south,
range 67 west, a strip of land 400 feet in width, being
195 200 feet on each side of the center of main track?

Mr. Stuart: That is objected to as asking for a conclusion of the witness and as not giving the wording of his assessment return; it ought to speak for itself.

A. Yes, sir; I know that has been included to the extent of 400 feet in width at that point and in that section.

Q. For each of these years since 1902? A. Yes, sir.

Q. Does that include 1902?

A. It includes 1902, yes, sir.

Q. What, if anything, has the Railroad Company, and its predecesso. s in title, since you have been tax commissioner, done about the payment of taxes arising upon the assessments made by the State Board of Equalization of this line of railroad part of which crosses section 20, township 3 south, range 67 west, as shown upon the map Exhibit A?

Mr. Stuart: That is objected to as incompetent and immaterial.

A. It has paid and settled all taxes arising through the assessment made by the State Board of Equalization for all of the years, excepting that for the year 1907 the first half only is paid, the second half not being yet due.

Mr. Stuart: We object to the answer as incompetent.

Cross Examination

By Mr. Stuart:

Q. You entered into the service of the defendant com-
196 pany in 1891, Mr. Scribner?

A. As tax commissioner for the predecessors, formerly the Union Pacific Railway Company.

Q. Where did you get the number of miles of track?
A. From statements secured each year from the chief engineer.
Q. You don't pretend to know anything about it personally?
A. I never measured it myself, no, sir.
Q. No. You don't know personally whether he gave all of the track or not?
A. I presume that he did, as it was the regular official mileage published in time-cards and in other ways.

Mr. Stuart: We object to the answer as not responsive.

Q. I am asking about your personal knowledge. You don't know personally whether he gave all the track or not?
A. Not through personal measurement of the track, no, sir.
Q. And up to 1902 you didn't pretend to give any acreage of track?
A. I pretended to give the acreage of all right-of-way owned by the company in the return of main track.
Q. Prior to 1902?
A. Yes, sir; but not specifically by acreage.
Q. I don't understand your answer. I understood you to say that you didn't give acreage prior to 1902.
A. Not returned specifically as so many acres, but the mileage returns which mileage included all of the right-of-way.
Q. Since 1902 you say you have given acreage?
197 A. For greater certainty. The law does not require it.
Q. Is the right-of-way of the road of different widths at different places?
A. Wherever granted through Act of Congress, it is of the same width, 400 feet.

Mr. Stuart: We object to the answer as not responsive.

Q. Is the width of road right-of-way different at different places on its line? A. Yes, sir, I believe so.
Q. What is the narrowest place that you have personal knowledge of?
A. On this line which we are speaking of from Denver to the Kansas line?
Q. Yes, sir.
A. I think there is a point within the City of Denver this side of Pullman where it is only about 100 feet.
Q. And there are other points on the road where the company took right-of-way under the Act of Congress of 1864, are there not, of 100 feet?

A. My recollection is that wherever the right-of-way crossed or the road crossed lands which had been entered prior to the Act of 1862, that the railroad company purchased and held what it needed to acquire.

Q. Under the Act of 1864?

A. I couldn't tell you as to that.

Q. Will you say to the Court that this right-of-way over the land in controversy was ever returned either to the State or the County by giving the number of the section?

A. Not at the point mentioned.

198 Q. Have you seen and examined this [may] Exhibit A of the defendant? A. Yes, sir.

Q. There is marked on the south side of the track of the railroad, and outside of its fence which is here indicated to be 50 feet from the center of the track, a public road running the length of all this land in controversy? A. Yes, sir.

Q. Do you know how long that public road has been there?

A. No, sir.

Q. Do you know whether that road was located prior to the location of the track of the defendant? A. I do not.

Q. I will ask you if that is not one of the main roads leading east out of the City of Denver? A. I don't know.

Q. I will ask you if that road was not originally about where the center line of the Union Pacific now is?

A. I don't know that.

Q. There is marked on this map mile posts Nos. 634 and 634½. How far is that mile post from the center of the track of the defendant (indicating)?

A. I couldn't tell you, I have no knowledge as to that.

Mr. Stuart: Will you agree about that—this mile post, how far it is from the center of the track?

Mr. Dorsey: I don't know, unless the map shows.

Mr. Stuart: The stem runs down there to the track.

Mr. Dorsey: The mile post is on the telegraph pole, I think, as a matter of fact, at least the mark is on the telegraph pole.

199 Mr. Stuart: Will you agree that the mile post is located inside of the fence as it is [not] built?

Mr. Dorsey: I don't know, Judge.

Q. What do you understand from this map—that this mile post is down near the track or is some 200 feet from the track and 150 feet outside of the fence and telegraph line?

A. My understanding is, although I have no definite knowledge on that point, that there may not in fact be a post at

that particular point, that his marking on the map shows the division of the miles, but there may not in fact be any post at that point. The nearest telegraph post to that point is marked with the mile marker.

Q. And these marks are on the telegraph posts, are they?

A. Yes, sir.

Q, Well, the evidence heretofore introduced shows those telegraph poles are 45 feet from the center of the track. Is that about your recollection?

A. I couldn't say, I have no knowledge as to that fact.

Q. Do you know anything about the leasing of these lands or any part of this right-of-way to Jacob Reudy and P. B. Horlick and Lee Midgett?

A. Only by hearsay. That is not under my jurisdiction.

Q. Have you ever seen either of those men? A. No, sir.

Q. When you say you have given in acreage of the right-of-way in recent assessments, do you mean to say that you
200 have given in that acreage from personal knowledge or from reports that you have received?

A. My inspection of and reports compiled from the right-of-way records in the office of the chief engineer.

Q. Inspection of the records, do you mean?

A. Yes, sir, inspection of the records.

Q. So that you have no personal knowledge as regards the acreage except as you gain it from that?

A. Except from the record.

Redirect Examination

By Mr. Dorsey:

Q. In gaining this acreage from the records, did you take a strip of land through section 20, 3 south, 67 west, being the section shown on Exhibit A, a strip 400 feet in width, being 200 feet on each side of the center of the track?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. And did you in making your report include said 400 foot strip across said section—your reports to the State Board of Equalization?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

Re-cross Examination

By Mr. Stuart:

Q. That is, you mean to say that you included it, to
201 the best of your knowledge, from the records that were furnished you, did you? A. From the records.

Q. In the engineer's office?

A. In the engineer's office, the right-of-way records.

ARTHUR W. SCRIBNER.

Subscribed and sworn to before me this 9th day of May, 1908.

SANFORD C. HINSDALE,
Examiner.

Leonard H. Eicholtz, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. Colonel Eicholtz, state your name, age, residence and occupation.

A. Leonard Henry Eicholtz; past 75; residence, Denver.

Q. What is your occupation at this time?

A. A civil engineer by profession. At this time I am practically a gentleman of leisure.

Q. Colonel Eicholtz, what, if any, connection did you have with the original construction of the Kansas Pacific railroad line, being the line leading in an easterly direction from Denver toward Kansas City?

A. Well, in 1869 and '70 I was in the employ of the company, the Eastern Division, and in 1870 during June or July I was superintendent of construction, laying the track from
202 Denver east.

Q. Did you commence the track-laying at Denver and lay it in an easterly direction? A. Yes, sir.

Q. And how far east did you superintend track laying?

A. I think about as far as Kiowa, I think about 40 miles east of Denver as near as I remember.

Q. Will you examine the map, Exhibit A, the blueprint which lies before you and which shows the line of said railroad extending across section 20, township 3 south, range 67 west, said portion being included between mile posts Nos. 633 and 635, and state whether or not you superintended the laying of track over that portion of the road.

A. Yes, sir, I laid the track 40 miles from Denver.

Q. And you did lay this part of the track?

A. Yes, sir.

Q. Did you also have anything to do with the laying of the track from Denver to Cheyenne, what was known as the Denver-Pacific track, for the Denver Pacific Railway and Telegraph Company?

A. Yes, sir, I superintended the construction, laying the track.

Q. When was the track completed between Denver and Cheyenne? A. I think about the 15th of June, 1870.

Q. And when did you commence laying track on that portion of the Kansas Pacific which you had charge of?

A. Immediately after the completion of the track from Cheyenne to Denver.

203 Q. And about what time did you lay the track across the land which is shown on Exhibit A?

A. I should judge about the first of July, sir.

Q. 1870? A. 1870, yes.

Q. Was the grading already done when you reached that point with your track?

A. Yes, sir, the grading had been completed.

Q. Do you know how long before you reached that point, the grading was completed there?

A. No, sir; I am not familiar with the grading of the track. I think it was finished just previously to our laying the track.

Q. When was the track laying on the Kansas Pacific completed, if you know, Colonel?

A. About the 15th of August, 1870.

Q. And the Kansas Pacific railway was opened at that time for travel into Denver? A. Yes, sir, it was.

Q. Have you recently seen that portion of the track of the Union Pacific Railroad Company which formerly belonged to the Kansas Pacific Railway Company, being a portion of the track which you state you laid and which extends over the land shown on Exhibit A?

A. Yes, sir, I have seen that recently.

Q. Will you please state whether the track as it extends across the land shown on Exhibit A is at present in the same location where you laid it?

A. It is undoubtedly; there is no evidence of removal.

204 Q. What, Colonel, has been your experience in connection with the railroad business other than laying the tracks which you have described?

A. Well, it has been locating lines and constructing.

Q. You were to a large extent connected with the construction of railroads for many years, were you not?

A. Oh, yes, sir; since 1852 I think. I commenced on the Pennsylvania railroad, I think, sir, in 1852.

Q. Colonel, what, if anything, has been your experience in dealing with real estate at and about Denver and in that locality?

Mr. Stuart: That is objected to as incompetent and immaterial.

A. Well, I have dealt a good deal in real estate in Denver but not in that immediate vicinity.

A. Well, whilst it has not a large commercial value, for railroad purposes and right-of-way it has a very material value.

Q. Well, that hardly answers the question. (Question read.) Just state whether you have any knowledge or not about such things.

A. Well, I have had considerable experience in dealing in outside properties, but none in that immediate locality. I should judge, though, in that location, within three, four or five miles of Denver, land should be worth from $75 to $100 an acre, more particularly if it had water.

Q. Colonel Eicholtz, will you please state what in your opinion is the value of that portion of the right-of-way
205 claimed by the Union Pacific Railroad Company, being 200 feet on each side of the center of its main track, in so far as the same is included in the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of said section 20, as shown on Exhibit A, as a part of the continuous right-of-way of the Union Pacific Railroad Company from Denver in an easterly direction to Kansas City, and your answer may be as to whether in your judgment it is worth more or less than $2,000.

Mr. Stuart: That is objected to as leading, is incompetent, immaterial and irrelevant.

A. As a right-of-way proposition, I should say it was worth more than $2,000. For commercial agricultural purposes or speculation, it may be worth fully $100 an acre.

Q. Colonel Eicholtz, what, if any, effect on the value of defendant's railroad leading from Denver to Kansas City would be occasioned, if the complainants in this suit succeeded in depriving the Railroad Company of title to that portion of its said 400 foot right-of-way, being 200 feet on each side of the center of its main track, in so far as the same is included in the said subdivisions of section 20 as I described above—would it increase or lessen the value of the railroad?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

206 A. It would be a very serious detriment to the road and would cost the company a round sum to change the location at that point and changes on the long tangent and through a cut of four or five feet in places.

Q. Colonel Eicholtz, will you state how much in your opinion the value of the defendant's railroad would be diminished by such a result, and you may state whether such diminution, if any, would be more or less than $2,000.

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant and not the proper measure of damages.

A. I think it would be in excess of $2,000.

Q. Colonel Eicholtz, will you kindly state what in your opinion would be the pecuniary loss to the defendant Railroad Company if the complainants succeeded in depriving the Railroad Company of its title to that portion of its 400 foot right-of-way lying within the said subdivisions of section 20 which I have described above—would said pecuniary loss be more or less than $2,000?

Mr. Stuart: That is objected to as leading, incompetent, immaterial and irrelevant and not laying the proper measure of value.

A. I think it would be possibly as much as $3,000, involving half a mile of track.

207 Cross Examination

By Mr. Stuart:

Q. Colonel Eicholtz, how many acres are included in a right-of-way 100 feet wide, and then again in a right-of-way 400 feet wide, across the lands that have been described to you?

Mr. Dorsey: That is objected to as immaterial and irrelevant, not proper cross examination, and especially because it is immaterial and irrelevant in respect to the number of acres included in a 100 foot right-of-way.

A. In the first instance, it would be about 6¼ acres.

Q. That is in 100 feet?

A. Yes, sir. And in 400 feet it would be 24 or 25 acres; I have not carried it out fractionally.

Q. Colonel Eicholtz, how much was this land worth per acre in the market in April, 1906?

Mr. Dorsey: That is objected to as not proper cross examination, immaterial and irrelevant.

A. Well, as stated, land in that locality I suppose would be worth $75 to $80 an acre, though I don't profess to be an expert. If it has water rights, it is worth more than that. Without water, I should say that was its value.

Q. Well, supposing you take this tract of land, this half mile tract you have described, in April, 1906, and it has no water rights, and a railroad seeks to locate its right-of-way across that land, those two 40's— A. Yes, sir.

Q. —what would it be worth in the market, that land be
208 worth in the market, at that time,—that is, what would the acreage that is sought by the railroad be worth in the market?

Mr. Dorsey: That is objected to as not proper cross examination, immaterial and irrelevant.

A. I should judge it would be worth $80 an acre perhaps. There is not much evidence of improvement about there, that it would be worth any more today than it was then.

Q. Colonel Eicholtz, you notice there is a road marked along the south side of the track of the defendant company running parallel therewith through these two 40's—

A. Yes, I am aware of that, sir.

Q. —a public road. Now, I will ask you if that road didn't originally run about on the line where the railroad is, and that the railroad crowded that public road over?

Mr. Dorsey: That is objected to as not proper cross examination, immaterial and irrelevant.

A. I couldn't say personally.

Q. You don't remember? A. No, sir.

Q. Where does that road run to in leading out of Denver—what principal points east and north?

A. Well, apparently towards Brighton. It crosses at Sand Creek some distance south of the crossing of the road to Brighton.

209 Q. It just crosses the track at this point, Colonel?

A. Yes, sir, as I remember it. The probability is that that road was established by the graders at that early date and used by the tie haulers in distributing their ties along the track. You will find a wagon track along the track at most all portions of it, at some places may be used as a public road and at other places just for the purpose of distributing ties and used by the graders.

Q. Now, Colonel, I will ask you if that has not been, ever since your knowledge of the roads around Denver commenced, one of the principal roads leading out of Denver?

Mr. Dorsey: That is objected to as not proper cross examination, immaterial and irrelevant.

A. I don't think it is the leading road.

Q. I said one of the leading roads.

A. Well, perhaps; but it is not the prominent road running in the direction of Brighton, running east. That passes near the cemetery if you remember, and crosses Sand Creek at the notorious place known as Sand Creek House, and that is the main road to Brighton. Now, this road is evidently a half or three quarters of a mile to the south and it is a road I never have traveled.

Q. Is it not at this time, Colonel, one of the principal roads leading east from Denver, and has it not been for years?

210 A. Not to my knowledge, sir. I have not traveled in that direction but I have always regarded the road running by the Riverside Cemetery as the main road east from Denver.

Q. But that road bears off north of this line, does it not?

A. Yes, it is north of the line.

Q. Is not this the principal road out to that point south of the line of railroad?

A. Yes, sir, south. This other road practically follows the Denver Pacific. The road you refer to follows the Kansas Pacific.

LEONARD H. EICHOLTZ.

Subscribed and sworn to before me this 20th day of May, 1908.

SANFORD C. HINSDALE, Examiner.

Charles D. Ford, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name? A. Charles D. Ford.

Q. And what official position do you occupy?

A. Register of the United States Land Office.

Q. For this land district? A. Yes, sir.

Q. You have already been sworn in this case, Mr. Ford?

A. I have.

211 Q. How far east of Denver does the land district of which you have charge extend?

A. It runs to the east line of range 57.

Q. How far north and south along this easterly part of this district does that extend?

A. Well, it runs 10 townships south of the base line and in most of the district it runs north to the Wyoming line—that would be 12 north.

Q. Does your land district include range 67 west?

A. Yes, sir.

Q. And it extends on that range between what townships?

A. From 10 south 67 to 12 north 67.

Q. That would include in your district, then, section 20, township 3 south, range 67 west? A. Yes, sir.

Q. Have you examined your records in respect to the tier of sections in range 67, lying north and south of section 20, township 3 south, range 67 west, for the purpose of ascertaining what, if any, of them have been patented to any railroad company?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

A. Well, I made a very casual examination, but I have brought with me the tract-books for the land you describe.

Q. What does your tract-book show in respect to the tier of sections lying north and south of said section 20, township 3 south, range 67 west, and for a distance of 20 miles north and 20 miles south of said section, as to whether or
212 not any of said sections in said tier have been patented to any railroad company?

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant.

Mr. Dorsey: Do you want us to have certified copies of these records, or is it sufficient to exhibit them only?

Mr. Stuart: I do not wish you to have a certified copy of any record. I am willing to take the witness' statement in connection with the records as he produces them.

Mr. Dorsey: Then you do not insist that the records themselves be introduced, do you?

Mr. Stuart: He has got them here and I say I am willing to take his statement in connection with the records as he speaks from them here.

Mr. Dorsey: You will be satisfied if he reads from the record?

Mr. Stuart: Yes, sir.

A. The records show that in most of the odd numbered sections, both north and south of 3 south 67, portions have been patented to the Union Pacific and in some instances all of them. I couldn't give any answer more definite without consulting the records themselves.

Q. Well, will you examine the records themselves if you have them with you, Mr. Ford, and state from those records what the exact facts are in respect to said tier of sections?

A. I have the tract-book of 3 south 67. In section 5—shall I call off these sections?

Q. Well, are these sections which you call off the ones
213 lying in the same tier of sections and north and south of section 20?

A. Exactly. The first section north of 20, 3 south, 67, would be section 17.

Q. Yes, sir. Confining yourself to the tier of sections spoken of lying north and south of said section 20, will you please state what your records show, Mr. Ford?

A. (Referring to record) In section 20. The north half of the southeast quarter of 17 was selected for the Kansas Pacific railway by S. J. Gilmore, Agent, under Act of July 1, 1862, and July 2, 1864, on March 3, 1869; and patented December 11, 1879, per list No. 14. Now, the next odd numbered section north of 17 in the same township and range would be 5, and the records show (referring to record) that the northwest quarter of 5—this is 3 south, 67—was selected October 16, 1874, by J. P. Devereaux, Agent, for the Denver Pacific Railroad Company, under Act of March 3, 1869, list No. 2; patented April 24, 1875. Now, the next township directly north of that would be 2 south, 67, and the first odd numbered section would be 29. (Referring to record) Here is an entry of the southeast quarter of 29, 2 south, 67, selected October 16, 1874, by J. P. Devereaux, Agent, for the Denver Pacific Railroad Company, under Act of March 3, 1869, list No. 2; patented April 24, 1875. The next odd numbered section directly north would be 17. The record does not show that any part of 17 was patented to the Union Pacific.
214 The next directly north of 17 would be 5; this is the northeast quarter and the west half of 5, 2 south, 67; Union Pacific Railroad Company, selected October 4, 1890, under Act of July 1, 1862, and July 2, 1864; patented February 26, 1897, per approved list No. 38.

Q. How far north in miles is the section you have just testified concerning from section 20, 3 south, 67 west?

A. It would be about nine miles north. Now, the odd numbered section directly north of these in the township north—

Q. Was that section 5 you just testified about?

A. That was section 5, yes, sir. (Last part of previous answer read)—would be section 29, 1 south, 67; this is in direct line north of the others I have mentioned. All of 29 selected by M. A. Macallister, Agent, Union Pacific Railroad Company, August 15, 1892, under Act of July 2, 1862, and July 2, 1864; patented February 26, 1897, per approved list No. 38.

Q. Patented to the Union Pacific?

A. Selected by B. A. Macallister. The next north would be 17, 1 south, 67. All of section 17 selected by B. A. Macallister, Agent, Union Pacific Railroad Company, August 15, 1892, under Acts—I am quoting now exactly from the record—Acts of July 1, 1892, and July 2, 1864; patented February 26, 1897, per approved list No. 38.

Q. May I ask right here a question. The statement in the last record you read as to July 1, 1892, is evidently a clerical error, is it not?

215 A. I think it must be; it is evidently an error of the clerk making the entry.

Q. It is evidently intended for 1862?

A. Yes, sir, undoubtedly. The next odd numbered section directly north of 17 would be 5. All of section 5, 1 south, 67, Union Pacific Railroad Company, selected October 14, 1890, under Acts of July 1, 1862, and July 2, 1864; patented February 26, 1897, per approved list No. 38. Now, this takes the record to the base line, and the next north would be 1 north, 67, in another book.

Q. How many miles north of section 20, township 3 south, range 67 west, have you now proceeded?

A. About 15 miles.

Q. Then the next township would complete the 20 miles?

A. Yes, sir.

Q. If you will kindly proceed with that.

A. The next would be 1 north, 67. I will take section 29, 1 north, 67, first. (Reading) The southwest quarter to Union Pacific Railroad Company, selected November 16, 1896, per list No. 13; patented November 12, 1897, per approved list No. 40. Then the southeast quarter and the north half of the same section, Union Pacific Railroad Company, patented per list No. 47, April 12, 1902. Then going directly north would be 17. All of 17 Union Pacific Railroad Company, selected October 26, 1891, under Acts of July 1, 1862, and, July 2, 1864; patented February 26, 1897, per approved list No. 38. Then directly north would be 5. All of section 5, Union Pacific Railroad

216 Company, selected October 26, 1891, under Acts of July 1, 1862, and July 2, 1864; patented February 26, 1897,

per approved list No. 38. That would take to the 20 miles north of section 20, 3 south.

Q. You have now proceeded 20 miles north of section 20, township 3 south, range 67. Now will you kindly proceed in the same way 20 miles south of section 20, township 3, south, range 67 west.

Mr. Stuart: That is objected to as incompetent, immaterial and irrelevant. While the complainants object to this evidence as incompetent, immaterial and irrelevant, they do not object to Mr. Ford stating that in a southern direction the entries are about the same, and thus summarizing the result that would be taken from the books.

Mr. Dorsey: I will ask you to withdraw the incompetent part of that objection.

Mr. Stuart: It is incompetent as between the parties. It don't prove anything. I am not objecting on the ground that he has given the summary of the tract-books he has read from in regard to the matter south. My objections as to the matter north I have stated before.

Mr. Dorsey: Well, the objection you have given is incompetent, immaterial and irrelevant and proves nothing between the parties, but you don't object to the form or character of the proof—is that correct?

Mr. Stuart: I don't object to the form or character of the proof, as I have here stated now, qualifying it, but I do not think it is competent evidence as regards this title in any respect, or relevant or material. I do not object because certified copies of the Land Office records are not furnished, and I do not object to the witness stating the result of his examination
217 south of this road, as compared with what it was north of the road, stating it in the form of a conclusion.

Q. I will ask you, then, Mr. Ford, to state whether you have examined the records of the Land Office for the purpose of ascertaining what has been done in the way of issuing patents to the Union Pacific Railroad Company, and other railroad companies, its predecessors in title, to the tier of sections lying directly south of section 20, township 3 south, range 67 west, and for a distance of 20 miles south of said section.

Mr. Stuart: I object to this evidence as having no bearing upon the issue between these parties in reference to this right-of-way and for that reason it is incompetent, immaterial and irrelevant.

A. Titles have been issued to the Kansas Pacific railroad or the Union Pacific railroad in the odd numbered sections covering the townships specified.

Q. And the tier of sections specified?

A. And the tier of sections specified, yes, sir.

Q. I will ask you then in a general way—I will ask you, Mr. Ford, to state if you know what the records of the Land Office show in respect to the issuance of patents for the odd numbered sections on each side of the railroad of the Kansas Pacific extending east of Denver through your land district for a distance of 20 miles on either side of said road?

218 Mr. Stuart: Same objection as last specifically made.

A. Patents have issued for the Kansas Pacific and the Union Pacific in the odd numbered sections in those townships.

Cross Examination Waived.

CHARLES D. FORD.

Harper M. Orahood, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, occupation and place of residence, Mr. Orahood?

A. Harper M. Orahood; attorney at law; residence, Denver, Colorado.

Q. What, if any, connection have you had with Union Pacific Railroad Company and the railroad companies which preceded it, and when, during what period, did such connection, if any, continue?

A. I was attorney for the Union Pacific Railway Company and constituent and preceding companies for about 28 years, terminating in 1900.

Q. Were you in the year 1892 attorney for the Kansas Pacific Railway Company?

A. Well, as I recollect, the Kansas Pacific Company had been merged in the Union Pacific Railway Company, and if you mean for the property which originally comprised the Kansas Pacific Railway Company, yes.

219 Q. But the Kansas Pacific Railway Company as a corporate organization was not then doing business, was it?

A. No, sir; it was merged and became one of the constituent companies of the Union Pacific Railway Company about 1881 or 1882.

Q. And it was for the Union Pacific Railway Company that you were then acting as attorney, was it?

A. Yes, sir; that took in all those other companies.

Q. Did you at any time during your service as attorney for the railroads which you have described have any conversation with Mr. Thomas B. Stuart, one of the complainants herein, or Mr. Charles A. Murray, the other complainant herein, in respect to the right-of-way of the Union Pacific across section 20, township 3 south, range 67 west?

A. Well, I will ask if that is this land that was in dispute between the Iliff estate and Mr. Adams?

Q. Yes, sir, I understand that is the same land.

A. Yes, sir, I had some conversation with Judge Stuart but more with Mr. Murray in regard to it.

Q. Do you remember during what years those conversations occurred?

A. No, sir, I couldn't say. It was while the case was on appeal or writ of error or some other proceeding in the Supreme Court, possibly while it was in the district court.

220 Q. Will you please state, Mr. Orahood, what those conversations were as nearly as you can recollect?

A. Well, as nearly as I can recollect, Mr. Murray and possibly Mr. Stuart, but more particularly Mr. Murray, said to me that they were claiming the title to this land and expected to eventually procure the title for their client or clients, and that in their examination of that title they had found we had no title, or deed I think was the way it was expressed, to the right-of-way of the Kansas Pacific over this particular tract of land, and a plat was submitted to me showing the survey and showing it ran diagonally on one side of this tract of land and outside of our right-of-way, cutting off a small piece of land in triangular shape, running to a point at one end and widening as it went toward the other line—I can't give the points of the compass.

Q. For your information, Mr. Orahood, I would state that the property touched by the Kansas Pacific line of the Union Pacific Railroad Company and claimed by the complainants is shown on Exhibit A, and consists of the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter,—those two 40 acre tracts.

A. Then it would be this piece down here at the south of the right-of-way, running clear across one 40 and a very short distance on the other.

Q. With the map Exhibit A before you, Mr. Orahood,

221 will you state further what these conversations were?

A. Well, Mr. Murray suggested to me as attorney for the Union Pacific that cutting off this three-cornered piece rendered it practically worthless to the owners of the remain-

ing part of this tract of land, and that being so close to Denver it would be of value to the company for trackage purposes, for storage of cars, and things of that kind, and wanted the company to buy this three-cornered piece and incidentally suggested that we ought to have a deed for the right-of-way also. And I replied to that, that I would take it up with the company, but I felt sure we had land enough and that we wouldn't care to buy it, but that the engineering department would be the proper persons to pass upon that question and that I would submit it. I stated also that so far as the right-of-way was concerned, that we were in possession of the right-of-way and had been ever since the construction of the road, back in 1871 or along there some time, and had paid the taxes on it during all that time, and we certainly had a good title to it by occupation and possession. Whether anything was said about having a right-of-way under the Act of Congress, I don't remember; there probably might have been, for I know there was correspondence with the officers of the company in regard to that matter of the right-of-way under the Act of Congress.

222 Q. Mr. Murray testifies that the conversations with you began in the year 1892 and continued for two or three years after that.

A. I should think that was about the time, as I recollect it.

Q. Is it not a fact, Mr. Orahood, that shortly prior to that time, the question of title under the Acts of Congress to this right-of-way through this section had been investigated by your office, and it had been determined that the railroad had title under the Acts of Congress to the right-of-way?

Mr. Stuart: That is objected to as immaterial and irrelevant.

A. A very careful examination had been made through all of the records and deeds and everything pertaining to it, and it was the opinion of our office that we had a good title to this particular right-of-way across this tract of land under the Acts of Congress. I might say that it was also the opinion of Judge Usher, who was one of the general attorneys of the company, Hon. J. P. Usher.

Mr. Stuart: That is objected to as all hearsay, incompetent, immaterial and irrelevant.

Q. This investigation as to the right-of-way through the section in question was carried on in your office either by yourself or under your supervision, was it not, Mr. Orahood?

A. Yes, sir. I had the men in the office working on it and I gave it a great deal of personal attention. It was a very

important question at that time, not only with regard to this but to other land.

223 Mr. Stuart: I make the same objection to this question and answer.

Q. Did you, Mr. Orahood, at any time during these conversations, either with Mr. Stuart or Mr. Murray, tell them or either of them that the Railroad Company had no title under the Acts of Congress to the right-of-way through this section?

A. No, sir, I never made such a statement as that.

Q. Did you ever make any similar statement to that to either of them?

A. No, sir. I did say to them that we always liked to have deeds from anybody who had any claim so as to perfect our title, and possibly the company would give some comparatively small amount for settling any dispute there might be in regard to this title.

Q. What was your idea in making that statement?

Mr. Stuart: I object to his ideas and I object to conclusions as being incompetent, immaterial and irrelevant.

A. I might say this in further explanation of this conversation, that either in the conversation with Judge Stuart or with Mr. Murray the intimation was made that suit might be brought against the company for this right-of-way and they would be compelled, if they had title, to file a cross-complaint or bring a cross-suit for condemnation of the property, and I thought it would be better to make a settlement, as I say, and pay some comparatively small amount, then have litigation. The policy of the company was to make settlements
224 where they could be made reasonably with parties making claims.

Q. Mr. Orahood, did you ever have in your office a gentleman by the name of Ritter?

A. Yes, sir, Halsted L. Ritter.

Q. When was Mr. Ritter in your office?

A. During the time when I was city attorney—some place from 1902 to 1904.

Q. Was Mr. Ritter in your office at any time during the period you [you] acted as attorney for these railroad companies or any of them? A. No, sir, never.

Q. Did you know a gentleman by the name of John T. Deweese?

A. Colonel Deweese, I knew him. He is dead now, died in Washington two or three years ago.

Q. Did he formerly reside in Denver? A. Yes, sir.

Q. Was he ever at any time attorney for the Kansas Pacific Railway Company or the Union Pacific Railroad Company, or any of the railway companies which afterwards succeeded to the title of the Kansas Pacific? A. Never.

Q. I will ask you to state, Mr. Orahood, whether or not your suggestion to Mr. Stuart or Mr. Murray, whoever it was made to, in regard to paying a small sum of money for a deed, was made as an offer of compromise to avoid a lawsuit, or otherwise?

Mr. Stuart: I object to that as a conclusion, as immaterial and irrelevant.

225 A. It was made expressly for that purpose and to get rid of any claim that might be made to this land. I might say further that, so far as that was concerned, it was a conversation between attorneys without any authority on my part to buy this land or do anything in regard to its title except the litigation in court. Any settlement would have to be referred to the officers of the company.

Mr. Stuart: That is objected to for the same reason.

Cross Examination

By Mr. Stuart:

Q. Mr. Orahood, when you were spoken to by Mr. Stuart and Mr. Murray, did you submit the matter, as you said you would, to the proper authorities of the road and tell them that your attention had been called to this matter?

A. Yes, sir. A letter was written, as I recollect, and I remember it more in the general course of business than personally in regard to it, that it would be reported to the general attorney of the company at Omaha, and I also remember of talking with the resident engineer here in Denver. If you wish, I can tell you what he said about this triangular piece of land.

Q. Whatever you did and whatever you said in reference to that matter, Mr. Orahood, was authorized by the company, was it not?

A. I couldn't say that it was. I acted as the attorney, and, as I have already said, I would carry on negotiations and then submit them to the company for its approval or rejection.

226 Q. Did it ever disapprove of anything you did or said in reference to this matter?

Mr. Dorsey: That is objected to as not proper cross examination; it is a matter of correspondence.

A. Well, that would be a somewhat difficult question to answer, because they didn't always act upon recommendations, although they generally did, Mr. Stuart.

Q. I say in regard to this matter. (Question read.)

Mr. Dorsey: That is objected to for the same reason.

A. Oh, I thought you meant generally. Only to this extent, that they didn't buy this property or act upon it or carry on any further negotiations, considering that they had good title to it under the Act of Congress and by right of occupation and possession.

Q. You didn't aim to do or say anything in this matter, Mr. Orahood, that was beyond your power as a general attorney of the railroad, did you? A. Oh, no, no.

Q. Do you now remember of anything that you did or said in reference to this matter that was beyond your power as a general attorney of the railroad?

A. Well, really I didn't do anything excepting to talk a little about it, and there was no price fixed, or amount that was asked for the property, no amount was offered for the property. It was mereby a conversation in regard to
227 whether or not something could be done.

Q. Then you don't remember of anything you did or said that could be claimed to be beyond your power as the agent and attorney of the Railroad Company, do you?

Mr. Dorsey: That is objected to because Mr. Orahood has stated he was not the agent, he was merely the attorney, and it is not proper cross examination and calls for a conclusion and is immaterial and irrelevant.

Q. Strike out the word "Agent." (The question reading now:) Then you don't remember of anything you did or said that could be claimed to be beyond your power as the attorney of the Railroad Company, do you?

A. That would depend on a great variety of things; that would be who made the claim and what was done and what was said. So far as my own—

Q. I don't think you understand my question, Mr. Orahood.

A. I was going to say so far as my own opinion of the matter is concerned, I didn't do anything that was beyond my power, but as a matter of fact I didn't do anything except have some preliminary conversation in regard to it.

Q. You say that Mr. Dewease was never attorney for any of these companies?

A. Not to my knowledge, and I think if he had been such attorney I would have known it.

Re-direct Examination

By Mr. Dorsey:

Q. Is there anything further you wish to state, Mr. Orahood, in connection with this matter?

228

A. No, sir, nothing at all.

HARPER M. ORAHOOD.

Subscribed and sworn to before me this 19th day of May, 1908.

SANFORD C. HINSDALE, Examiner.

Edward L. Lafferty, a witness produced on behalf of the defendant, being first duly sworn, in answer to interrogatories propounded to him testified as follows:

Direct Examination

By Mr. Dorsey:

Q. What is your full name, occupation and place of residence, Mr. Lafferty?

A. Edward L. Lafferty; right-of-way lease agent; Omaha.

Q. In whose employ are you now?

A. The Union Pacific Railroad Company.

Q. How long have you been in the employ of the Union Pacific in that capacity?

A. Well, I have been in the employ of the Union Pacific for eight years, at this position three years, possibly three and a half.

Q. What are your duties as right-of-way lease agent?

A. Well, as the company has a 400 foot right-of-way through the majority of the land over the system, my duties are to lease land—in some cases where the fence is out 50 feet,

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to lease the outer 150 feet; also in some cases the fence is out 200 feet and we lease inside the 200 foot fence there.

Q. Will you please examine the papers now offered you which have been marked by the Examiner Defendant's Exhibits L and M, and state whether or not those are true copies of leases which you were instrumental in causing to be made?

A. Yes, sir.

Q. I now hand you what purport to be originals of those leases, copies of which are marked Exhibits L and M, and will ask you to state whether or not those are the original executed copies? A. They are.

Q. Will you examine the signatures of those leases and state what they purport to be?

A. They are the parties to whom the lease was made.

Q. What are the names signed there?

A. In Exhibit L it is P. B. Horick and Lee Midgett, and in Exhibit [L] it is Jacob Ruedy.

Q. Were you present at the time these papers were executed by the gentlemen named?

A. Yes, sir. One of the witnesses to these signatures and I were together.

Q. Did you sign your name to these two documents as a witness to the signatures of the gentlemen whose names you have just read? A. Yes, sir.

Q. Did you see those men sign these leases?

A. Yes, sir.

Q. Were the leases executed on behalf of the Union Pa-
230 cific Railroad Company? A. Yes, sir.

Q. And one executed copy delivered in each instance to the lessees named? A. Yes, sir.

Mr. Dorsey: I now offer in evidence Exhibits L and M and ask consent that the originals may be withdrawn and true copies substituted for them.

Mr. Stuart: I consent to the substitution of true copies, but object to the originals as immaterial and irrelevant.

Q. What, if anything, if you know, have these lessees done under the leases? A. The fireguard was plowed in 1907.

Q. Do you know what, if anything, has been done during 1908?

A. No, sir, I don't; I couldn't state positively.

Q. Who plowed the fireguard that you speak of?

A. P. B. Horick and Lee Midgett in one case, lying west of the station limits in the east half of section 20, and Jacob Reudy in the southwest quarter of section 20.

Q. Who are these parties named as lessees in the two documents, if you know?

A. Well, I don't know Horick and Midgett,—that is, I don't know who they are. Jacob Reudy is a dairyman living near this land.

Q. Well, you saw Mr. Horick and Mr. Midgett at the time they signed this lease, didn't you? A. Yes.

Q. Do they live in the neighborhood out there?

A. Yes, they did at that time.

231 Q. Do you know whether they do now or not?

A. I couldn't say.

Q. Have you ever heard of their moving away?

A. No, sir, I have not. The chances are I would have, because the section foreman's duty—I won't say duty, but then he is supposed to notify the right-of-way lease agent where parties have moved.

Cross Examination

By Mr. Stuart:

Q. Have they plowed on both sides of the railroad?

A. Both sides, yes, sir.

Q. When did you see it last, this land?

A. I think it was about December, 1907.

Q. And they had plowed on both sides of the railroad at that time, had they? A. At that time.

Q. I will ask you if this map (Exhibit A) don't show that they have not plowed on the south side at all and that they plowed on the north side in 1908?

A. That is what it says there.

Q. This lease provides that they shall plow at least 250 feet from the main track, does it? A. Yes, sir.

Q. So that you propose to make them plow on somebody's else land 50 feet outside of any possible right-of-way you could have? A. Yes, sir.

Q. Do you know of either one of these parties being connected in the title of these two tracts of land, these two
232 40's now in dispute?

A. Well, my impression was that Horick and Midgett was tenants or lessees of part of this land at the time the lease was made.

Q. Part of the land, you say?

A. They were tenants and using part of the land.

Q. Tenants of whom?

A. They were tenants on the land.

Q. Tenants of the owners of the land?

A. I couldn't say as to that.

Q. Well, they were not tenants of the Railroad Company, were they? A. No, sir.

Q. Then, your impression was that they were tenants on that land?

A. They were supposed—I thought Midgett and Horick were leasing part of section 20, and consequently made them a right-of-way lease.

Q. Is your residence in Denver or in Omaha?

A. In Omaha.

Q. How long were you here at that time that you made that lease?

A. Well, I have the whole system to work. Of course I am not at any one place any length of time. I most generally work between Denver and Kansas City the first three months, January, February and March— on that order—that is, that is my routine in the past year. I have been trying to get the leases so that they will fall due at a certain time.

Q. That don't answer my question. I want to know how long you were here at the time you made this lease?

A. I couldn't exactly state right now. I might have
233 been here a couple of days and I might have been here a week.

Q. Had you received any letters from Horick and Midgett and Reudy about this land or any of it before you came?

A. No, sir.

Q. Where did you meet them?

A. Well, we met Mr. Reudy right near his house, and I think we met Mr. Midgett and Mr. Horick right near a little house on the north side of the track near Sand Creek there.

Q. How far from the land?

A. Well, I shouldn't think it would be over 200 yards.

Q. From these two 40's?

A. Well, 200 yards from the track.

Q. Well, I am talking about these two 40's. How far was it from these two 40's that you met the men?

A. If I remember rightly, I thought we were on part of section 20, I couldn't say just exactly which part.

Q. Who was with you when you met them?

A. The section foreman.

Q. What was said?

A. Well, I asked him to lease the right-of-way.

Q. Asked whom?

A. Asked these parties to lease the right-of-way and in consideration we gave them the old ties for plowing the fire-guards.

Q. Yes. And what did they say?

A. They accepted it and said that they would do so.

Q. Did you have to struggle very much to get them to do it.

A. No, sir.

234 Q. You just happened to strike three men the first time you went out there, that would take it?

A. Yes, sir.

Q. You didn't know whether they were connected with the title to the land or not? A. No, sir.

Q. Now, didn't you go out there for the very purpose of manufacturing evidence for this case as far as you could—

A. No, sir.

Q. —by attempting to show a lease?

A. My position is as I said before, and I am getting paid for doing this work, and that was part of my official duties.

Q. The section foreman went with you?

A. The section foreman.

Q. Yes.

A. Of course he didn't go with me at all times, he is not required to go, only he happened to be there and he knew these parties, and consequently—

Q. You told him you wanted somebody to lease that right-of-way on these two 40's?

A. Yes, sir, through the whole section.

Q. And he went and found you somebody? A. Yes, sir.

Q. Now, this lease is also for agricultural purposes, is it not? A. Yes, sir.

Q. Have these parties plowed that fireguard which they agreed to?

A. Well, I couldn't exactly state whether it was 250 feet or not. My duties are not—that is, I am not supposed—

Q. What does your lease say about being 250 feet?

235 A. It states the plowing should be 250 feet.

Q. And they have plowed it in accordance with their lease?

A. I couldn't exactly say whether it is 250 feet; I have not examined, as I said before.

Q. Well, you have no reason to suppose they have violated their lease, have you? A. No, I have not.

Q. So, besides the 200 foot right-of-way there, you are taking another 100 feet, to plow the fireguards on, from the owners' land?

A. Yes, sir, 50 feet either side.

Q. Have you seen either of these parties since you have been here this time? A. No, sir.

Q. Do you know whether there are any of them living now or not? A. I couldn't say positively.

Q. Don't you know Mr. Dorsey has been trying to find them, has written to them, made every effort to find these parties, and has failed so far? A. No, sir.

Q. Has he not told you so? A. No, sir.

Re-direct Examination

By Mr. Dorsey:

Q. When did you first learn about this lawsuit?

A. Let me see—Friday afternoon—no, Friday morning, about 11 o'clock.

Q. You mean yesterday morning?

A. Yesterday morning.

Q. Had you ever heard of it prior to that time?

A. No, sir.

236 Q. At the time you took these leases, did you know there was any such litigation as this or any such controversy? A. No, sir.

Q. You stated on cross examination that you understood that these men were in possession of the adjoining land as tenants or in some capacity—did you so state?

A. I was under that impression in regard to Exhibit L as to Midgett and Horick.

Q. What about Ruedy?

A. Well, I didn't know whether he was using any of the land; in fact I didn't know much about him.

Q. Well, Mr. Reudy you say lived in the immediate neighborhood, didn't he?

A. Yes, sir, he lives within that immediate neighborhood.

Re-cross Examination

By Mr. Stuart:

Q. It was not necessary that you should know anything about this lawsuit in order to prepare these leases and get these parties to sign them, was it? A. I must answer no.

EDWARD L. LAFFERTY.

Subscribed and sworn to before me this 9th day of May, 1908.

Mr. Stuart: I want these minutes to show here that we ask of the defendant the production of Jacob Reudy, Lee Midgett and P. B. Horick.

Mr. Dorsey: The defendant will say that it can not produce Jacob Reudy, Lee Midgett and P. B. Horick because they are not in its possession, and that the complainants can secure the attendance of these persons by causing the issuance of the proper subpoena or subpoenas.

237 Thereupon the defendant rested its case.

Thereupon the hearing was adjourned.

United States of America,
District of Colorado—ss.

I, Sanford C. Hinsdale, duly appointed Examiner in Chancery by the Circuit Court of the United States for the District of Colorado, do hereby certify that on the days mentioned in the proceedings and depositions in this case, I was attended by the counsel and witnesses aforesaid, at my office 803 Continental Building, Denver, Colorado, that said witnesses, to-wit, Elmer O. Davis, Alonzo F. Vick Roy, James Parks, Edwin Scrafford, Patrick J. McGill, Arthur W. Scribner, Leonard H. Eicholtz, Charles D. Ford, Harper M. Orahood and Edward L. Lafferty, were first duly sworn by me according to law as witnesses in behalf of defendant in the suit or cause in the caption hereto mentioned, and then examined before me orally by counsel; and by the consent of the parties by their several said solicitors,

the examinations and depositions of said witnesses were severally stenographically written down and afterwards typewritten; that the said examinations were had in the presence of the solicitors of the several parties who appeared herein; and that said depositions, after being completed and typewritten, were severally read over by the witnesses deposing the same and were duly signed and sworn to by said witnesses so making
238 and signing the same.

I further certify that the Exhibits marked A to M inclusive, defendant's proofs were duly introduced before me in behalf of defendant during the taking of said depositions, and Exhibits A, C, E, H, K, L, and M are herewith returned and filed with my report.

I further certify that the foregoing is a true statement of all the proceedings had before me in the matter of taking testimony on behalf of defendant herein.

SANFORD C. HINSDALE,
Examiner in Chancery.

(Endorsed) No. 4953, United States of America, District of Colorado. In the circuit court. Thomas B. Stuart and Charles A. Murray, Complainants, vs. Union Pacific Railroad Company, Defendant. Defendant's Testimony. Filed Jun. 16, 1908, Charles W. Bishop, Clerk. Sanford C. Hinsdale, Examiner.

239 Original Exhibit No. A, Defendant's Proofs, being large blue print showing Union Pacific track and right of way through section 20, township 2, south range 67 west, transmitted with this record to U. S. Circuit Court of Appeals.

240 Exhibit No. C.
Deft's Proofs. 6 pp.

S. C. Hinsdale, Examiner.

(Copy)

United States of America,
Department of the Interior.

Washington, D. C., February 8, 1908.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as the same appear on file or of record in this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(Sgd.) FRANK PIERCE.
First Assistant Secretary of the Interior.

Office of The Leavenworth, Pawnee and Western Railroad Company,

Leavenworth, Kansas November 15th, 1862.

Honl. Caleb B. Smith,
Secretary of the Interior,
Washington, D. C.

Dr. Sir:—

The last clause of Section 9 of "An Act: entitled an "act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean approved July 1st, 1862 reads as follows, towit: "Each of said companies (the Central Pacific Railroad Company of California, and the Leavenworth, Pawnee and Western Railroad Company of Kansas) shall file their acceptance of the conditions of this Act in the Department of the Interior within six months after the passage of this act." I herewith enclose a resolution of the "Board of Directors of the Leavenworth, Pawnee and Western Railroad Company, accepting the provisions of said act so far as they relate to said company, and request that said resolution of acceptance be filed in your office."

I also enclose a certified copy of a contract entered into by the Leavenworth, Pawnee and Western Railroad of the one part, and Messrs. Ross, Steel & Co. of the other part, for building and equipping said road in accordance with the provisions of said act, and request that it be placed on file
241 with the accompanying resolution of acceptance.

Sec. 12 of the same act, provides that, "The track upon the entire line of railroad and branches shall be, of uniform width, to be determined by the President of the United States, so that, when completed cars can be run from the Missouri river to the Pacific Coast." As we have commenced the construction of our branch, and expect to push the work to a speedy completion, we desire "His Excellency, the President of the United States, at his earliest convenience, to fix the width or gague for the main road and branches, so that, we will not be delayed in our work. The roads connecting with the L. P. & W. R. R. on the East; an the Missouri Pacific, and the Hannibal and St. Joseph roads. The gague of the former is five feet six inches, of the latter, four feet eight and one half inches; for all practical purposes the first is

too wide, and the latter too narrow. As the act provides, "that the width of track shall be uniform, from the Missouri" River to the Pacific coast" I would most respectfully suggest, the width of five feet as preferable to either of the others. The country from the Missouri river to the eastern slope of the Rocky Mountains is gently undulating, and exceedingly well adapted for a medium gague, or even a broad gague, of say five and a half or six feet; but for the extention westwardly over the Rocky, Humboldt, and Sierra Nevada ranges of mountains, where heavy grades, and sharp curves must be encountered, the medium gague of five feet, in my judgment, would be greatly preferable. Of the two extremes, (if either is to be adopted by the President) 4 ft. 8½ inches or 5 ft. 6 inches, I would prefer the latter, as that width, would give a continuous gague, from the Mississippi river at St. Louis to the Pacific Coast. The Mississippi river at that city, breaks the gague of all roads centering there, at any rate, the Missouri river on the west of Iowa, will break the gague of all roads passing westwardly through that state, I conclude therefore,

that the gague indicated, viz five feet, would be accept-
242 able to all companies, in interest.

I enclose a letter to His Excellency the President of the United States, in which I call his attention to this question of gague. Will you be kind enough to hand it to him.

and very much oblige
Your obt. Svt.

J. H. McDOWELL,
President L. P. and W. R. R. Co.

(Copy)

1862. Nov. 14. At a called meeting of the directors of the Leavenworth, Pawnee and Western Railroad Company, held this day at the office of the said company at the City of Leavenworth, at which were present J. H. McDowell—President, I. C. Stone, Amos Rees, A. J. Isacks, and R. P. C. Wilson.

The President in the Chair—

The following resolution of A. J. Isacks was unanimously adopted—viz—"Resolved on this No. 14, A. D. 1862, that the Leavenworth, Pawnee & Western Railroad Company, hereby accept the conditions of an act of Congress entitle "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the Government the use of the same for postal, military and other purposes—

Approved July, 1862"

So far and fully as the same relates to said Company and that a certified copy hereof be forwarded by the President of the Railroad Company without delay to the Secretary of the Interior with a request that the same be filed in the Interior Department as required by said Act, and also a certified copy of the Contract of this Company made with Mess. Ross, Steel & Co. for the construction and equipment of the railroad from the Missouri river at the mouth of Kansas river,
243 on the south side thereof, so as to connect with the Pacific railroad of Missouri to the one hundredth meridian of longitude west from Greenwich, as is provided in said Act.

SAM DENMAN, Secretary.

J. H. McDOWELL, Prest.

I hereby certify the above and within to be a true copy taken by me from the original entry in the Books of the Company.

SAM DENMAN,
Sec. L. P. & W. R. R. Co.

Leavenworth City,
Nov. 4, 1862.

(Copy)

Department of the Interior.

December 23d, 1862.

J. H. McDowell, Esq.
President of the Leavenworth,
Pawnee, and Western R. R.
Leavenworth City, Kansas.

Sir—

Your letter of the 15th ultimo, accepting the provisions of the 9th Section of the Act of Congress of 1st July, 1862 to aid in the construction of a Railroad, etc. from the Missouri River to the Pacific Ocean, was duly received and filed in this Department.

Very respectfully,
Your obt Servant
CALEB B. SMITH, Secretary.

244 Exhibit No. E.

Deft's Proofs. 3 pp
S. C. Hinsdale, Examiner.

(Copy)

United States of America
Department of the Interior.

Washington, D. C., February 8, 1908.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as the same appear of record or on file in this Department.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(Sgd) FRANK PIERCE.
(Seal) First Assistant Secretary of the Interior.

(Copy)

Union Pacific Railway Company
Eastern Division

Saint Louis Sep. 5, 1864.

Saml. Hallett
Contractor

Hon. J. P. Usher,
Secy Interior
Washington City

As directed to do I enclose copy of a Resolution passed at a Meeting of our Board on the 3d inst accepting the provisions of an act entitled "An Act to amend an act to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postals, Military and other purposes Approved 2d July 1864. And ask that the same may be filed in your Department and its receipt acknowledged.

Very resply.
Yr Obt Servt
JNO. P. DEVERAUX Secretary.

245 (Enclosure)

Resolved that this Company does hereby accept the provisions of an act of the Congress of the United States entitled "An Act to amend an act to aid in the construction of Rail-

road and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postal, Military and other purposes "Approved 2 July 1864. And the Secretary of this Company is hereby required under the Seal of the Company to transmit to the proper Officials of the Government certified copies of the resolution.

(Copy)

Office of the Union Pacific Railway Co., E. D.
Saint Louis Mo September 5th 1864

I hereby certify that the foregoing is a true copy of a Resolution as taken from the Records of this Company and papers at a Meeting of the Board held on the 3d inst.

In testimony whereof and in pursuance of said resolution, I have hereunto set my hand and affixed the seal of said Company the day and year aforesaid.

(Seal) JNO. P. DEVERAUX
Secretary.

Department of the Interior,
September 9th, 1864.

John P. Deveraux, Esq.
Secretary
U. P. R. R. Co., E. D.
St. Louis, Mo

Sir:

I hereby acknowledge the receipt of your letter of the 5th instant, transmitting a certified copy of a resolution passed by the Board of Directors of the Union Pacific Railway Company, Eastern Division, to accept the provisions of the Act
246 of Congress entitled "an act to amend an act entitled an Act to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes: approved July 1st, 1862" approved July 2nd 1864, and to inform you that the said resolution has been placed on the files of the Department.

I am, Sir, Very Respectfully,
Your obt Servant
WM. T. OTT
Acting Secretary of the Interior.

Exhibit H.

Deft's Proofs. 2 pp.
S. C. Hinsdale, Examiner.

(Copy)

"F." Department of the Interior,
S. S. M.

General Land Office,

Washington, D. C., April 3, 1908.

I hereby certify that the annexed copy, with the endorsements thereon, is a true and literal exemplification of the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(Seal) (Sgd) H. M. SANFORD,
Recorder of the General Land Office.

247 (Copy)

Pac. R. R.

Department of the Interior

Washington, D. C., Nov. 30th, 1866.

Sir:

I forward herewith, a map, received on the 28th inst. from John D. Perry, Esq., President of the Union Pacific Railway, Eastern Division, showing the location of the general route of said road from the boundary line between Colorado and Kansas, (to which point, a map has been heretofore filed) west to the City of Denver and from Denver to a point fifty miles west of the Meridian thereof, on which line he desires the withdrawal of the lands agreeably to law.

You will therefore cause the proper instructions to be given for the withdrawal of the lands along said route as designated by the enclosed map, agreeably to the act of Congress relating to the same, approved July 1, 1862, July 2, 1864 and July 3, 1866.

After taking a copy of the map you will please return the same for file in this Department.

Very Respectfully,
Your Obt Servant,
O. H. BROWNING, Secretary.

Hon. Joseph S. Wilson,
Comr. of the Gen. Land Office.

(Endorsement): G 91,045 Hon. Secretary of Interior, Nov. 30, 1866. Transmits a Map of Eastern Division U. P. Railway showing the general route from boundary line between Colorado & Kansas to Denver & fifty miles west. Map returned and withdrawal ordered Dec. 10, 66. Bloss. R pg 169 Bloss Dec 1 1866.

248 Exhibit No. K.

Deft's Proofs. 2 pp.
S. C. Hinsdale, Examiner.

(Copy)

United States of America.
Department of the Interior.

Washington, D. C., March 24, 1908.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original as the same appears on file in this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(Seal) (Sgd) FRANK PIERCE,
First Assistant Secretary of the Interior.

Department of the Interior.
Washington, D. C., 18" Oct., 1872.

Sir:

I have the honor to transmit herewith, for your action, report, dated 4" instant, of the Commissioners (Messrs. Isaac H. Sturgeon, Geo. W. Johnes and D. H. Willard) appointed by you on the 29" August last to examine and report upon the road and telegraph line constructed by the Kansas Pacific Railway Company from the 393-9425/10000 mile to the 638-6/10 Mile at Denver, Colorado.

The Commissioners report that the said portion of road, with the telegraph line, has been comp'eted as required by law and the instructions of this Department. I recommend, therefore,

its acceptance, and the issue to the Company of patents
249 for lands due on account of such construction.

Very respectfully,
Your ob't servant,
B R. COWEN,
Actg. Secretary.

To The President.

(Indorsed)

Dept. of the Interior. 18" Oct. 1872. B. R. Cowen, Actg. Secretary. Submits report of Comrs. on Kansas Pac. Railway.

9425	6	6575

&c from 393 10000 to 638 10 mile. 244 10000.

Executive Mansion, Oct. 19th, 1872. The within recommendations are approved, and the Head of The Interior Dept. will cause them to be carried into effect.

U. S. GRANT.

250 Exhibit No. L.

Deft's Proofs 2 pp.
S. C. Hinsdale, Examiner.

Div. No. 3943 Audit No.
C. E. No. 11140 L. C. No. 3034

Right-of-way Lease. Duplicate

Articles of Agreement, Entered into this First day of..... July..... 1906, between Union Pacific Railroad Company, hereinafter for convenience called "Lessor," as party of the first part, and F. B. Horick and Lee Midgett ..... of Denver Colo. ....., hereinafter for convenience called "Lessee," as party of the second part,

Witnesseth: That said Lessor, in consideration of the agreements herein made by said Lessee, agrees to lease and let, and does hereby lease and let to the said Lessee for a term determinable at any time at the will of the Lessor, not exteeding Three (3) years ..... after the day of the date above written, the following described premises situate near Sandown..... County of Denver.....and State of Colorado..... towit: All that part of the Right of way, of the Union Pacific Railroad lying West of the West station limit of Sandown in the East half (E ½) of Section number twenty (20) in township No. three (3) south of range No. sixty-seven (67) West of the 6th P. M. which is included between lines parallel with

and distant respectively fifty (50) feet and two hundred (200) feet on both sides from the center of the main track of said railroad as constructed through said sections, as shown colored yellow, on plat here to attached for agricultural purposes
251 only. Reserving, however, to Union Pacific Railroad Company, the right to construct and maintain, upon the premises hereby leased, any and all snow fences, which are, or may hereafter be needed for the protection of its railroad.

It is agreed that Lessee shall each year, during the existence of this lease, plow and maintain suitable and sufficient fire-guards upon the northerly and southerly sides of the main track of the Lessor the full length of the premises hereby leased, for the purpose of preventing the spread of fire caused by the operation and maintenance of said railroad. The said fire-guards shall be located at a minimum distance of two hundred and fifty (250) feet from the center of said track, and shall not be less than six (6) feet wide. The said Lessee also agrees to release the Lessor from all damages caused to crops or other property located on the leased premises, by fire arising from the operation and maintenance of said railroad; and to release said Lessor from all damages caused to the property or person of said Lessee by such fires when there has been a failure to plow and maintain suitable fire-guards as herein provided. Said Lessee agrees to cut as low as possible all grain growing between the track and fire-guards, and not to stack any grain or hay between said track and fire-guards, and to keep the premises above described clear from straw, rubbish, and all material other than stubble or corn stalks which would tend to increase the risk from fire.

It is further agreed that said Lessee shall not place, buildings or structures of any character upon the leased premises.

It is further mutually covenanted and agreed, by and between the parties hereto, that the Lessee may have, and that he will take and remove from the Lessor's right-of-way, during the term of this agreement, to be used by said Lessee for
252 fuel only, all of the ties removed by said Lessor, from that part of its track located between the telegraph poles on above described land which may be delivered to said Lessee by said Lessor's section foreman in charge of said track; provided, that the right of property and the right of possession to each and every of said old ties shall not pass to or vest in said Lessee, but shall remain in said Lessor until such time as the said ties are actually used for fuel, and said Lessor may from time to time enter upon the premises of said Lessee to inspect any ties thereon, and may retake and remove from said

Lessee's premises, any of said ties which have not been used for fuel.

Said Lessee also releases and agrees to save and hold harmless said Lessor from all liability for injuries to said Lessee, his employes or property, occurring from any cause whatsoever, while said Lessee or his agents may be engaged in removing said old ties, or in the performance of any of his covenants or agreements herein written.

Said lessee further agrees that whensoever any of such old ties are ready for delivery to him, he will, within five days after receiving notice thereof from the lessor's Section Foreman, remove the old ties described in such notice, from the lessor's right of way; and upon failure so to do within such five days, the said lessee's right to such old ties shall be forfeited and the said lessor may thereupon make such other disposition thereof as to it may seem best.

Said Lessee further agrees that immediately after passing through any gate, opening or bars in the fence of said Lessor, into or from its right of way, he will safely and securely close the same, and he further covenants and agrees that he will not take down or remove any wire or wires, or any part of the fence of said Lessor, for any purpose, at a point where there is no gate, except upon the written consent of said lessor first had and obtained; and that, in case any part of such
253 fence is temporarily removed or taken down, said Lessee agrees that he will immediately and safely replace the same in good, first class condition.

It is further agreed that said Lessee shall have no power to assign this lease, or sublet the whole or any part of the property so leased, to any other person or persons, except by written permission of the Lessor, or its duly authorized representative.

It is also agreed that if the Lessee abandon the property hereby leased, the said Lessor may enter upon and take possession of the same.

This lease is made upon condition that the said Lessor may at its option determine and end the term hereinafter agreed, anything hereinbefore written to the contrary notwithstanding, and that said Lessee shall be and hereby is declared to be a tenant at will of the Lessor.

The Lessee covenant and agree to vacate and surrender up the quiet and peaceable possession of the premises above described to the Lessor or its successors, at a time not later

than from the date first herein written, or at any time prior to the said date after the said Lessee shall have received thirty days' notice in writing to vacate and surrender said premises, and said Lessor agrees that if possession of said premises is taken prior to the expiration of this lease, and at a time when crops are growing thereon, that it will pay the full value thereof at the time of such taking to the Lessee.

It is further agreed that in case the Lessee shall fail to keep and perform each and every stipulation and condition of this lease, then the rights and estate of the Lessee therein shall absolutely cease and determine, and the Lessor may take immediate possession of said demised premises as upon condition broken.

....

It is further agreed that all the terms and conditions of
254 this agreement shall inure to the benefit of the said Railroad Company, its successors and assigns.

UNION PACIFIC RAILROAD COMPANY,
By W. L. Park, General Superintendent.
P. B. HORICK,
LEE MIDGETT.

Witness:
W. H. Guild,
E. L. Lafferty.

(Written in red pencil on margin) Copy.

Original Exhibit No. L., Defendant's Proofs, being plat herein referred to, transmitted with this record to U. S. Circuit Court of Appeals.

255 Exhibit No. M.

Deft's Proofs 2 pp.
S. C. Hinsdale, Examiner.

Div. No. 3944 Audit No.
C. E. No. 11141 L. C. No. 3035

Right of way Lease.

Articles of Agreement, Entered into this First day of July ..... 1906, between Union Pacific Railroad Company, hereinafter for convenience called "Lessor," as party of the first part, and ... Jacob Ruedy .....

of Denver, Col. ....., hereinafter for convenience called "Lessee," as party of the second part,

Witnesseth: That said Lessor, in consideration of the agreements herein made by said Lessee, agrees to lease and let, and does hereby lease and let to the said Lessee for a term determinable at any time at the will of the Lessor, not exceeding Three (3) years ..... after the day of the date above written, the following described premises situate near Sandown ..... County of .. Denver ..... and State of Colorado to-wit:

All that part of the Right of Way, of the Union Pacific Railroad, in the West half (W ½) of section No. twenty (20), Also in all of section No. nineteen (19) both sections in township No. three (3) south of range No. sixty-seven (67) West of the 6th P. M. which is included between lines, parallel with and distant respectively fifty (50) feet and two hundred (200) feet on both sides from the center line of the main track of said railroad, as constructed through said sections as shown colored yellow on plat hereto attached. for agricultural pur-
256 poses only. Reserving, however, to Union Pacific Railroad Company, the right to construct and maintain, upon the premises hereby leased, any and all snow fences, which are, or may hereafter be needed for the protection of its railroad.

It is agreed that Lessee shall each year, during the existence of this lease, plow and maintain suitable and sufficient fire-guards upon the Northerly and Southerly sides of the main track, of the Lessor the full length of the premises hereby leased, for the purpose of preventing the spread of fire caused by the operation and maintenance of said railroad. The said fire-guards shall be located at a minimum distance of two hundred and fifty (250) feet from the center of said track, and shall not be less than six (6) feet wide. The said Lessee also agrees to release the Lessor from all damages caused to crops or other property located on the leased premises, by fire arising from the operation and maintenance of said railroad; and to release said Lessor from all damages caused to the property or person of said Lessee by such fires when there has been a failure to plow and maintain suitable fire-guards as herein provided. Said Lessee agrees to cut as low as possible all grain growing between the track and fire-guards, and not to stack any grain or hay between said track and fire-guards, and to keep the premises above described clear from straw, rubbish, and all material other than stubble or corn stalks which would tend to increase the risk from fire.

It is further agreed that said Lessee shall not place buildings or structures of any character upon the leased premises.

It is further mutually covenanted and agreed, by and between the parties hereto, that the Lessee may have, and that he will take and remove from the Lessor's right-of-way, during the term of this agreement, to be used by said Lessee
257 for fuel only, all of the ties removed by said Lessor, from that part of its track located ~~between the telegraph poles~~ on above described land which may be delivered to said Lessee by said Lessor's section foreman in charge of said track; provided, that the right of property and the right of possession to each and every of said old ties shall not pass to or vest in said Lessee, but shall remain in said Lessor until such time as the said ties are actually used for fuel, and said Lessor may from time to time enter upon the premises of said Lessee to inspect any ties thereon, and may retake and remove from said Lessee's premises, any of said ties which have not been used for fuel.

Said Lessee also releases and agrees to save and hold harmless said Lessor from all liability for injuries to said Lessee, its employes or property, occurring from any cause whatsoever, while said Lessee or his agents may be engaged in removing said old ties, or in the performance of any of his covenants or agreements herein written.

Said Lessee further agrees that whensoever any of such old ties are ready for delivery to him, he will, within five days after receiving notice thereof from the lessor's Section Foreman, remove the old ties described in such notice, from the lessor's right of way; and upon failure so to do within such five days, the said lessee's right to such old ties shall be forfeited, and the said lessor may thereupon make such other disposition thereof as to it may seem best.

Said Lessee further agrees that immediately after passing through any gate, opening or bars in the fence of said Lessor, into or from its right of way, he will safely and securely close the same, and he further covenants and agrees that he will not take down or remove any wire or wires, or any part of the fence of said Lessor, for any purpose, at a point where there is no gate, except upon the written consent of said Lessor first had and obtained: and that, in case any part of such
258 fence is temporarily removed or taken down, said Lessee agrees that he will immediately and safely replace the same in good, first class condition.

It is further agreed that said Lessee shall have no power to assign this lease, or sublet the whole or any part of the property so leased, to any other person or persons, except by written permission of the Lessor, or its duly authorized representative.

It is also agreed that if the Lessee abandon the property hereby leased, the said Lessor may enter upon and take possession of the same.

This lease is made upon condition that the said Lessor may at its option determine and end the term hereinafter agreed, anything hereinbefore written to the contrary notwithstanding, and that said Lessee shall be and hereby is declared to be a tenant at will of the Lessor.

The Lessee covenant and agree to vacate and surrender up the quiet and peaceable possession of the premises above described to the Lessor or its successors, at a time not later than three (3) years from the date first herein written, or at any time prior to the said date after the said Lessee shall have received thirty days' notice in writing to vacate and surrender said premises, and said Lessor agrees that if possession of said premises is taken prior to the expiration of this lease, and at a time when crops are growing thereon, that it will pay the full value thereof at the time of such taking to the Lessee.

It is further agreed that in case the Lessee shall fail to keep and perform each and every stipulation and condition of this lease, then the rights and estate of the Lessee therein shall absolutely cease and determine, and the Lessor may take immediate possession of said demised premises as upon condition broken.

....

It is further agreed that all the terms and conditions of
259 this agreement shall inure to the benefit of the said Railroad Company, its successors and assigns.

UNION PACIFIC RAILROAD COMPANY,
By W. L. Park, General Superintendent

JACOB RUEDY.

Witness:
W. H. Guild,
E. L. Lafferty.

(Written in red pencil on the margin) Copy.

Original Exhibit No. M., Defendant's Proofs being plat herein referred to, transmitted with this record to U. S. Circuit Court of Appeals.

Endorsed: No. 4953. United States of America, District of Colorado. In the Circuit Court. Thomas B. Stuart and Charles A. Murray, Complainants, v. Union Pacific Railroad Company, Defendant. Defendant's Exhibits. Filed Jun. 16, 1908. Charles W. Bishop, Clerk. Sanford C. Hinsdale, Examiner.

260 In the Circuit Court of the United States for the District of Colorado.

Thomas B. Stuart and Charles A. Murray, Plaintiffs,
No. 4953. vs.
Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Eastern Railroad Company, Defendants.

Stipulation.

It Is Hereby Stipulated, By and between the parties hereto, by their respective solicitors, that no objection will be made to the answer of Union Pacific Railroad Company, based upon the fact that it is not under the seal of said corporation, or upon the fact that said answer is signed and verified on behalf of said corporation by Clayton C. Dorsey, its General Attorney.

STUART & MURRAY,
Solicitors for Complainants.

CLAYTON C. DORSEY,
261 WM. V. HODGES,
Solicitors for Defendant, Union Pacific Railroad Company.

Endorsed: No. 4953. In equity, in the Circuit Court of the U. S. for dist. of Colo. Thomas B. Stuart and Charles A. Murray, Plaintiffs, vs. Union Pacific R. R. Co., et al., Defendants. Stipulation to no objection will be raised to answer by reason of lack of seal of defendant Company or its verification by its general attorney. Filed Nov. 11, 1908. Charles W. Bishop, Clerk. Dorsey & Hodges, Attorneys for Defendant U. P. R. R. Co.

Seventh Day, November Term. Wednesday, November 11th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

Thomas B. Stuart and Charles A. Murray,
4953. vs. In Chancery.
Union Pacific Railroad Company, et al.

Bill to quiet title.

This cause coming on now to be heard on final hearing on the bill of complaint, amendment to bill of complaint, answers, replication, testimony and exhibits taken and filed herein, Thomas B. Stuart, Esquire, appearing as solicitor for the complainants, and Clayton C. Dorsey, Esquire, ap-
262 pearing as solicitor for the respondents, is argued by counsel to the hour of adjournment.

Eighth Day, November Term. Thursday, November 12th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

Thomas B. Stuart and Charles A. Murray,
4953 vs.
Union Pacific Railroad Company, et al.

In Chancery Bill to quiet title.

This cause coming on now to be further heard on final hearing on the bill of complaint, amendment to bill of complaint, answers, replication, testimony and exhibits taken and filed herein, Thomas B. Stuart, Esquire, appearing as solicitor for the complainants, and Clayton C. Dorsey, Esquire, appearing as solicitor for the respondents, is argued by counsel to the hour of adjournment.

Ninth Day, November Term. Friday, November 13th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

Thomas B. Stuart and Charles A. Murray,
4953 vs.
Union Pacific Railroad Company, et al.

In Chancery Bill to quiet title.

This cause coming on now to be further heard on final hearing on the bill of complaint, amendment to bill of com-
263 plaint, answers, replication, testimony and exhibits taken and filed herein, Thomas B. Stuart, Esquire, appearing as solicitor for the complainants, and Clayton C. Dor-

sey, Esquire, appearing as solicitor for the defendants, is argued by counsel;

And thereupon, on consideration thereof, the court finds the issues herein joined in favor of the defendants.

Wherefore, it is ordered, adjudged, and decreed by the court, that the bill of complaint herein be, and the same is hereby, dismissed out of this court at the costs of the complainants to be taxed.

In the Circuit Court of the United States, District of Colorado.

Thomas B. Stuart and Charles A. Murray, Complainants,
No. 4953. vs.
The Union Pacific Railroad Company, et al., Defendants.

Assignment of Errors.

Come now the complainants and file the following assignment of errors upon which, and each of which, they and each of them will rely.

I.

The United States Circuit Court for the District of Colorado erred in dismissing complainants' bill, in that upon the face of the pleadings themselves it appears that complainants are entitled to recover, and that defendant, The Union
264 Pacific Railroad Company, is, and at all times has been, a mere trespasser upon complainant's lands.

II.

The Court erred in failing and refusing to find and adjudge upon the evidence adduced that complainants were entitled to a decree quieting their title to the lands in controversy.

III.

The Court erred in holding and adjudging, upon the issues and evidence, that complainants were entitled to no relief whatever, and in dismissing their bill of complaint accordingly.

IV.

The Court erred in dismissing said suit and entering a final decree therein in favor of the said defendants for its costs against complainants.

V.

The Court erred in finding generally against complainants and in favor of the defendant.

VI.

The Court erred in finding that the defendants, or any of them, ever filed with the Secretary of the Interior, any map of the general route of the Kansas Pacific Railway, west of the western boundary line of Kansas.

265 VII.

The Court erred in finding that the defendants or any of them ever filed with the Secretary of the Interior, any map of the definite location of the Kansas Pacific Railway west of the western boundary line of Kansas.

VIII.

The Court erred in finding that the President of the United States ever approved of any designation of any route of The Kansas Pacific Railway west of the western boundary line of Kansas.

IX.

The Court erred in finding that the President of the United States ever approved of any map filed by the defendants, or any of them, under the Act of 1864, designating the general route of The Kansas Pacific Railway west of the western boundary line of Kansas.

X.

The Court erred in finding that the defendants or any of them obtained any rights under the Act of Congress of 1864 along the line of the road of the Kansas Pacific Railway west of the western boundary line of Kansas, as the said road was constructed.

XI.

The Court erred in holding that it was necessary for the complainants to prove affirmatively, actual physical possession of the strip of ground in dispute, now occupied by
266 the railway track of defendants, in the face of the actual entry and presumed possession of the original preemptor under the Preemption Law.

XII.

The Court erred in holding that the defendants' interest in said land, or in said right of way, could, under any of the Acts of Congress, under which they claim, be anything more or greater than an easement.

J. C. HELM,
STUART & MURRAY,
Solicitors for Complainants.

Endorsed: No. 4953. In the Circuit Court, of the United States, District of Colorado. Thomas B. Stuart and Charles A. Murray, vs. The Union Pacific Railroad Company, et al. Assignment of Errors. Filed Dec. 2, 1908. Charles W. Bishop, Clerk. J. C. Helm, Stuart & Murray, Kittredge Building, Telephone 565, Denver, Colo., Attorneys for Complainants.

The United States of America, District of Colorado.

Know All Men By These Presents, That we, Thomas B. Stuart, Charles A. Murray are held and firmly bound unto Union Pacific Railroad Company in the full and just
267 sum of five hundred dollars, to be paid to the said Union Pacific Railroad Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this ..... day of December in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at the November term, A. D. 1908, of the circuit court of the United States, for the district of Colorado, sitting at Denver, in a suit pending in said court between Thomas B. Stuart and Charles A. Murray, Complainants, and Union Pacific Railroad Company, Respondent, judgment was rendered against the said complainants, dismissing their action and for costs and the said Thomas B. Stuart and Charles A. Murray, complainants, having prayed and been allowed an appeal to the United States Circuit Court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit; and a citation directed to the said Union Pacific Railroad Company citing and admonishing it to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Thomas B. Stuart and Charles A. Murray, Complainants, shall prosecute said appeal to effect, and answer
268 all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

(Seal) THOMAS B. STUART,
(Seal) CHARLES A. MURRAY,
(Seal) ROBT. I. CURRY,
(Seal) F. Q. STUART.

Approved Dec. 2nd, 1908,
Robt. E. Lewis, District Judge.

Justification.

The United States of America,
District of Colorado—ss.

Robt. I. Curry and F. Q. Stuart sureties, on the within bond, being each first duly sworn, [deposes] and [saith] that [he] is worth in real estate the sum below set opposite his name, that is to say: As to Robt. I. Curry, one thousand dollars, as to F. Q. Stuart, one thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(Seal, U. S.) ROBT. I. CURRY,
(Circuit Court) F. Q. STUART.

Subscribed and sworn to before me, at Denver this sec-
269 ond day of December, A. D. 1908.

CHARLES W. BISHOP, Clerk.

Endorsed: No. 4953. United States Circuit Court, District of Colorado. Thomas B. Stuart and Charles A. Murray, vs. Union Pacific Railroad Company, et al. Bond on Appeal. $500.00. Filed Dec. 2, 1908. Charles W. Bishop, Clerk. J. C. Helm and Stuart and Murray, Attorneys for appellants.

Forty-third Day, November Term. Thursday, December 31st, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

Thomas B. Stuart, et al.,
4953. vs. In Chancery.
Union Pacific Railroad Company, et al.

Bill to quiet title.

This cause coming on now to be heard; thereupon, on the application of the defendants to transmit certain original exhibits to the United States Circuit Court of Appeals to be used upon the hearing of the appeal in this cause;

It is ordered by the court that certain original exhibits material to the hearing of this cause in said circuit court of appeals, to-wit:

270 Defendants' Exhibit No. 2, being a large blue print showing Union Pacific track and right of way through section 20, township 2, south, range 67 west, and Defendants'

Exhibits Nos. L and M, being two small blue prints accompanying certain right of way leases, be, by the clerk of this court, transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit:

It is further ordered by the court that the above named exhibits be returned to this court after the determination by said United States circuit court of appeals of the appeal in this cause.

Fifty-eighth Day, November Term. Wednesday, January 27th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

Thomas B. Stuart, et al.,
4953. vs. In Chancery.
Union Pacific Railroad Company, et al.

Bill to quiet title.

This cause coming on now to be heard, and it appearing that the transcript of the record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit can not be completed within the return day of the citation herein;

It is ordered that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Eighth Circuit be, and the same is hereby, enlarged and extended for sixty (60) days.

271 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the District of Colorado.

Thomas B. Stuart & Charles A. Murray,
No. 4953. vs.
Union Pacific Railroad Co.

The Clerk will prepare a transcript of the record in the above entitled cause,

F. Q. STUART,
STUART & MURRAY
Attorneys for plffs.

To Charles W. Bishop, Clerk.
Denver, Colorado, Dec. 5, 1908.

(Endorsed): No. 4953, United States Circuit Court, for the District of Colorado. Thomas B. Stuart and Charles A. Mur-

ray, versus Union Pacific Railroad Company, et al. Praecipe for Transcript of the Record. Filed Dec. 5, 1908. Charles W. Bishop, Clerk.

Citation on Appeal.—U. S. Circuit Court of Appeals.

272 United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America: To Union Pacific Railroad Company—Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein Thomas B. Stuart and Charles H. Murray are appellants and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District court of the United States for the district of Colorado and ex officio Judge of the circuit court of the United States for the district of Colorado, at Denver, in said district, this second day of December, A. D. 1908.

ROBT. E. LEWIS, Judge.

Proof of Service

The United States of America,
District of Colorado—ss.

On this.....day of .....A. D. 190.., personally appeared .... before me, the subscriber, clerk of the circuit court of the United States, for the district of Colorado, and makes oath that he delivered a true copy of the within citation to ....

Sworn to and subscribed before me, this.....day of..... ..... A. D. 190...

..... Clerk.

By ..... Deputy Clerk.

We accept service of the within citation this 2nd Day of December, A. D. 1908.

DORSEY & HODGES,
Attys. for U. P. Ry. Co.

No. 4953. United States Circuit Court of Appeals Eighth Circuit. Thomas B. Stuart, et al., vs. Union Pacific Railroad Co. Citation. Filed in United States Circuit Court for the District of Colorado, this 2nd day of December, A. D. 1908. Charles W. Bishop, Clerk. By Alexander C. Hitzler, Deputy Clerk. J. C. Helm and Stuart and Murray, Attorneys for Appellants.

273 United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one to two hundred and seventy-one (271), both inclusive, to be a true, complete and perfect transcript and copy of the record, testimony, exhibits, stipulation as to verification, assignment of errors, bond on appeal, and all proceedings in the cause, as requested in the praecipe filed herein, together with a true copy of such praecipe heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein Thomas B. Stuart and Charles A. Murray were complainants and The Union Pacific Railroad Company, The Kansas Pacific Railway Company and The Eastern Colorado Railroad Company were respondents, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver in said district, this sixth day of February, A. D. 1909.

Seal
United States
Circuit Court
Dist. of Colorado.

CHARLES W. BISHOP, Clerk.

Filed Mar. 19, 1909. John D. Jordan, Clerk.

274 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the District of Colorado Sitting At Denver.

Thomas B. Stuart, et al.,
4953 vs.
Union Pacific Railroad Company, et al.

In Chancery Bill to quiet title.

This cause coming on now to be heard; thereupon, on the application of the defendants to transmit certain original exhibits to the United States Circuit Court of Appeals to be used upon the hearing on the appeal in this cause;

It is ordered by the court that certain original exhibits, material to the hearing of this cause in said circuit court of appeals, to-wit, Defendants' Exhibit No. 2, being a large blue print showing Union Pacific track and right of way through Section 20, township 2, south range 67 west, and Defendant's Exhibits Nos. L. and M. being two small blue prints accompanying certain right of way leases, be, by the Clerk of this court, transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit.

It is further ordered by the court that the above named exhibits be returned to this court after the determination by said
United States circuit court of appeals of the appeal in
275 this cause.

ROBT. E. LEWIS,
District Judge.

Denver, Colorado, December 31st 1908.

276 4953. U. S. Circuit Court, District of Colorado. Thomas B. Stuart and Charles A. Murray, vs. Union Pacific Railroad Co. et al. Order; clerk to transmit original exhibits to U. S. Circuit Court of Appeals. Filed Dec. 31, 1908. Charles W. Bishop, Clerk. 29/502.

Filed Mar. 19, 1908. John D. Jordan, Clerk.

(Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of Thomas B. Stuart and Charles A. Murray, Appellants, vs. Union Pacific Railroad Company, No. 3033, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of August, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1910, of said Court, Before the Honorable Walter H. Sanborn and the Honorable Willis Van Devanter, Circuit Judges, and the Honorable William H. Munger, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the nineteenth day of March, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Colorado was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Thomas B. Stuart and Charles A. Murray were Appellants and the Union Pacific Railroad Company was appellee, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 3033.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellants.)

On the twenty-fourth day of March, A. D. 1909, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3033.

THOMAS B. STUART et al., Appellants,
vs.
THE UNION PACIFIC RAILROAD COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

JOSEPH C. HELM.
THOMAS B. STUART.
CHARLES A. MURRAY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3033. Thomas B. Stuart, et al., Appellants, vs. The Union Pacific Railroad Company Appearance. Filed Mar. 24, 1909. John D. Jordan, Clerk. Joseph C. Helm, Thomas B. Stuart, Charles A. Murray, Counsel for Appellants.

(*Appearance of Counsel for Appellee.*)

And on the twenty-second day of May, A. D. 1909, the appearance of counsel for appellee was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3033.

THOMAS B. STUART et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

The Clerk will enter my appearance as Counsel for the Appellee.

C. C. DORSEY.
W. V. HODGES.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3033. Thomas B. Stuart, et al., Appellants, vs. Union Pacific Railroad Company. Appearance. Filed May 22, 1909. John D. Jordan, Clerk. C. C. Dorsey, W. V. Hodges, Counsel for Appellee.

(*Order of Submission.*)

And on the thirteenth day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909.

No. 3033.

THOMAS B. STUART et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Colorado.

MONDAY, *September* 13, 1909.

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. C. Helm for appellants, continued by Mr. Clayton C. Dorsey for appellee and concluded by Mr. Charles A. Murray for appellants.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the second day of May, A. D. 1910, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3033.—May Term, A. D. 1910.

THOMAS B. STUART and CHARLES A. MURRAY, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. Joseph C. Helm and Mr. Charles A. Murray (Mr. Thomas B. Stuart was with them on the brief), for appellants.

Mr. Clayton C. Dorsey (Mr. William V. Hodges was with him on the brief), for appellee.

Before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge.

Syllabus.

1. Federal Courts—Equity Jurisdiction—Suit to Quiet Title—Possession—General Rule and Exception.

Generally speaking, in the courts of the United States a suit to quiet title can not be maintained by a complainant who is not in

possession against a defendant who is in possession, because there is a plain, complete and adequate remedy at law; but in exceptional cases, where there is no such remedy at law, the general rule does not apply.

2. Same—Case Within Exception—Land Occupied as Railroad Right of Way.

Where a land owner, without objection, permits a railroad company, clothed with the power of eminent domain, to enter upon his land, construct its road thereover and put the same in operation, without first making compensation therefor, he is precluded from ousting the railroad company from its actual possession or interrupting the operation of its road; and where the extent of the railroad company's actual occupancy and use of the land for railroad purposes is in dispute so that the land owner can not maintain an action merely to recover compensation without either conceding the greater occupancy and use asserted by the railroad company or risking a recovery of less than he actually is entitled to receive, he is without a plain, complete and adequate remedy save by a suit in equity in the nature of one to quiet title, and this although he be not in possession of any part of the land.

3. Pacific Railroads—Right of Union Pacific Railroad Company, Eastern Division, to Extend its Railroad West of the 100th Meridian—Right of Way.

The right of the Union Pacific Railway Company, Eastern Division, to extend its road west of the 100th meridian via Denver to a connection with the main line of the Union Pacific Railroad was derived from the provision in section 9 of the act of July 2, 1864, 13 Stat. 356, 360, and a right of way 400 feet in width "through the public lands" for the road as so extended was one of the benefits accorded to the company by that provision. Upon the present record it is held that this right of way over the land in question was effective from the date of the grant, July 2, 1864, the land being then a part of the public lands.

VAN DEVANTER, *Circuit Judge,* delivered the opinion of the court.

According to the bill of complaint, this is a suit to quiet in the appellants, as against the appellee, the title to an entire tract of land containing 160 acres and located in the vicinity of Denver, Colorado; but it otherwise appears that what really is in controversy is only so much of this tract as is within a claimed railroad right of way across the same.

In addition to other matters not necessary to be stated here, the bill alleges that the full ownership, possession and right of possession of the entire tract are in the appellants, that their title is founded upon that of one Eastman, who, in accordance with the pre-emption laws of the United States, initiated a pre-emption claim to the tract on June 16, 1866, by settling thereon and filing in the proper land office the requisite declaratory statement, carried the

claim to final entry on January 2, 1867, and received a patent on October 1, 1867.

The answer, while expressly admitting the allegations of the bill relating to Eastman's pre-emption claim and to the steps resulting in the issuance of a patent to him, alleges that the appellee is the owner, and is in exclusive possession, of so much of the entire tract as lies within lines drawn parallel to and 200 feet distant, on either side, from the center line of the main track of the appellee's railroad where it traverses such tract; that the appellee's title and right of possession to this strip or right of way are founded upon the act of Congress of July 1, 1862, and other act supplemental thereto and amendatory thereof, known as the Pacific Railroad acts; that this title and right of possession are older than and superior to any title founded upon Eastman's pre-emption claim; that the railroad now existing along and over such right of way was constructed by the appellee's predecessors in title, under the authority granted in the Pacific Railroad acts and in conformity therewith; and that continuously since such construction the appellee's predecessors in title and the appellee have possessed and enjoyed such right of way.

Upon the final hearing the circuit court entered a decree dismissing the bill and an appeal brings the case here.

In our opinion, the proofs submitted to the circuit court establish that the situation at the commencement of the suit was as follows: The entire tract was open, unimproved and not in the actual possession of any one, save as a claimed railroad right of way across the same was fenced, improved and used for railroad purposes by the appellee. The appellants, as remote grantees of Eastman, were the owners of the full title to the entire tract, save as the appellee may have become entitled to a right of way across the same. The appellees was the successor in title of the Leavenworth, Pawnee and Western Railroad Company, whose name was changed in 1863 to the Union Pacific Railway Company, Eastern Division, and in 1869 to the Kansas Pacific Railway Company. Under the authority granted in the Pacific Railroad acts, and in conformity therewith, this company constructed a railroad from the Missouri River, at the mouth of the Kansas River, westward to Denver, Colorado, and thence northward, under an arrangement with the Denver Pacific Railway and Telegraph Company, to a connection with the main line of the Union Pacific Railroad at Cheyenne, Wyoming. The railroad so extending from the Missouri River to Denver traverses the tract now in question, was constructed in its present location in 1870 and has been in operation continuously since that time. While the appellee's predecessors in title and the appellee supposed and claimed that the Pacific Railroad acts granted a right of way 400 feet in width across this tract, their actual use of the same for right of way purposes was confined to a strip 100 feet in width, being fifty feet on either side of the center line of the main track of the railroad; and this much of the tract was fenced, improved and in the actual possession of the appellee at the commencement of the suit. The taking and use of this right of way were not sanctioned by any conveyance from Eastman or his successors in title

and none of them was compensated for any damages occasioned thereby. Nor was any objection interposed to such taking and use, save as the appellants or their predecessors in title, on several occasions after 1891, indicated to the railroad company that it was without any title to the strip used as a right of way and that they would insist upon some adjustment of the matter.

There was some evidence indicating that a map showing the general route of the railroad westwardly to the eastern Colorado line was filed with the Secretary of the Interior prior to November 30, 1866, the date not being more definitely stated; that a map showing the general route from the eastern Colorado line to Denver was accepted by that officer November 30, 1866, and that a map showing the definite location of the railroad to Denver was filed in the land office at Denver September 24, 1870; but none of these maps nor any better statement of what was shown thereon was offered in evidence.

On October 19, 1872, the President accepted the road as duly completed to Denver in conformity with the Pacific Railroad acts.

As to the payment of taxes, about which opposing counsel seem to differ, we think the evidence shows that the entire tract was assessed to the appellants, without any deduction of a right of way, that a 400 foot strip across the tract was included in the entire railroad right of way assessed to the appellee, and that taxes based upon such assessments were paid in due course by the appellants and the appellee respectively, no notice being taken of the double taxation involved therein. And this being so, neither party can derive any special advantage from the payment of taxes.

Notwithstanding the admission to the contrary in the answer, the appellee now suggests that Eastman did not perfect, but abandoned, his pre-emption claim and obtained title through the location of a military bounty land warrant on January 2, 1867. Passing the fact that the admission in the answer can not be rejected, we think the suggestion is not well taken. The Register of the Denver Land office, who was called as a witness, produced the tract book of his office and, without objection, testified that this book recited the filing of Eastman's pre-emption declaratory statement on June 18, 1866, and showed that on January 2, 1867, he "made final proof upon the land described, which he paid for by warrant No. 105,577." If he was abandoning his pre-emption claim there was no occasion for making final proof; but if he was perfecting that claim it was necessary that such proof be made. The pre-emption law, Act Sept. 4, 1841, 5 Stat. 453, required the claimant to make proof, commonly styled final proof, of his inhabitance and improvement of the land, and to pay therefor at the rate of one dollar and twenty-five cents per acre; and the law relating to military bounty land warrants, Act March 22, 1852, 10 Stat. 3, permitted pre-emptors to use such warrants in making the payment so required. The warrant, No. 105,577, used by Eastman was a military bounty land warrant, and its value, computed at the statutory rate, was identical with the amount Eastman had to pay to obtain title through his pre-emption claim. So, reading the evidence in the light of the statutes men-

tioned, we conclude that he perfected that claim and did not abandon it, which is important only as it shows that the title under the Eastman patent was initiated June 18, 1866, when he settled upon the land and filed the requisite declaratory statement, and not January 2, 1867, when he made use of the warrant.

We now come to the contention of the appellee that the case made by the evidence is not one of equitable cognizance, because the appellants are not in possession of any part of the tract and the appellee is in possession of a part of it.

It is true, generally speaking, that in the courts of the United States a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession; and this is so because there is a plain, complete and adequate remedy at law. Whitehead v. Shattuck, 138 U. S. 146, 150; United State Mining Co. v. Lawson, 67 C. C. A., 587, 134 Fed. 769; Lawson v. United States Mining Co., 207 U. S. 1, 9. But it also is true that in exceptional cases, where there is no such remedy at law, the general rule does not apply. In our opinion this is such a case. What really is the subject of the adverse claims of the parties is a strip 400 feet in width along the appellee's railroad. Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures, and is being used as a right of way for strictly railroad purposes. If it be not true that the Pacific Railroad acts granted a right of way 400 feet in width across the Eastman tract, it still is true that they authorized the acquisition, by agreement or condemnation, of a right of way thereover, not exceeding 200 feet in width. The owners of the tract did not insist that the railroad be not constructed and put in operation in advance of an exercise of this authority, but by their silence and inaction acquiesced in such construction and operation without any precedent agreement or condemnation. The railroad has been in operation since 1870 and its continued operation has become a matter of large public concern. In addition, there is a pronounced and bona fide dispute as to how much of the tract has been occupied and used as a right of way, the appellants insisting that this occupancy and use have been confined to 25 feet or less on either side of the center line of the railroad and the appellee insisting that they have extended to 50 feet or more on either side. In these circumstances it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way, that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, and that their rights can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise. As was said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 260, 271:

"There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession

of the land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

Other cases of like import are Roberts v. Northern Pacific R. R. Co., 158 U. S. 1, 11; Penn. Life Ins. Co. v. Austin, 168 U. S. 685, 698; New York City v. Pine, 185 U. S. 93; Donohue v. El Paso & Southwestern R. R. Co., 214 U. S. 499.

There may be cases in which an action for compensation or damages under the statute would afford a plain, complete and adequate remedy, but this is not such a case; for, in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits.

The question next to be considered is, Did the grant of a right of way 400 feet in width for this railroad, as made by the Pacific Railroad acts, embrace the strip here in controversy? That those acts granted such a right of way "through the public lands" does not admit of any doubt, but to answer the question just stated it is necessary to determine, first, when the right of way was granted for the portion of the road traversing the Eastman tract, and, second, whether this tract was then a part of the public lands.

The first of the Pacific Railroad acts, so called, is that of July 1, 1862, 12 Stat. 489, which by its first section authorized the construction of a railroad and telegraph line, since known as the main line of the Union Pacific, from an initial point *"on the one hundredth meridian of longitude* west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory;" by its second section granted a right of way "through the public lands" for the construction of such railroad and telegraph line "to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, sidetracks, turntables, and water stations;" by its third section, granted, in aid of the construction of such railroad and telegraph line, certain alternate odd numbered sections of public lands; and by its ninth section authorized the Leavenworth, Pawnee and Western Railroad Company to construct a line of railroad and telegraph from the Missouri River, at the mouth of the Kansas River, "to the aforesaid point *on the one hundredth meridian.* * * *, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid."

The next of those acts is the amendatory one of July 2, 1864, 13 Stat. 356, which by its third section authorized any of the railroad companies affected to acquire for its railroad, by agreement with "the owner or claimant" or by condemnation, "any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line;" by its ninth section declared: "That any company authorized by this act to contruct its road and telegraph line from the Missouri River to the initial point aforesaid, may construct its road and telegraph line *so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and subject to all the conditions and restrictions of this act;* Provided, further, however, that the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, *if the same had united with the Union Pacific Railroad on the 100th degree of longitude;* nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided;" and by its twelfth section declared: "And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, *shall have completed their road to the hundredth degree of longitude,* then the last named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad from the mouth of the Kansas River *to the one hundredth meridian of longitude* shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas River opposite said towns."

The next of those acts is the further amendatory one of July 3, 1866, 14 Stat. 79, which extended the time for filing a map designating the general route of the railroad of the Union Pacific Railroad Company, Eastern Division, provided for the withdrawal from sale of the lands along the entire line thereof so far as the same should be so designated, and declared: "Provided, that said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific Railroad *on the one hundredth degree of longitude as now required by law:* And provided further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

The next of those acts is the one of March 3, 1869, 15 Stat. 324, which authorized the Union Pacific Railroad Company, Eastern

Division, (1) to contract with the Denver Pacific Railway and Telegraph Company for the construction and operation by the latter of that portion of the former's line of railroad and telegraph between Denver and its point of connection with the Union Pacific Railroad at Cheyenne; (2) to grant to the Denver Pacific Railway and Telegraph Company "the perpetual use of its right of way and depot grounds," and to transfer to the latter company "all the rights and privileges, subject to all the obligations, pertaining to said part of its line;" and also declared that the alternate sections granted in aid of the construction of this line of railroad and telegraph should be so divided between the two companies that each would receive the sections along the portion of the line constructed by it.

As the Eastman tract is west of the 100th meridian, and as the act of 1862 fixed that meridian as the western terminus of this line of railroad, it is plain that the appellee's claim to the right of way now in question cannot be rested upon that act alone; and this is freely conceded. But the appellee invites attention to the language of the ninth section of the amendatory act of 1864, as hereinbefore set forth, whereby the railroad company was authorized to change the western terminus so as to connect with the main line of the Union Pacific "at any point westwardly" of the 100th meridian, if it deemed such westward connection more practicable or desirable, and whereby it was provided that any such departure in route should be attended by the same benefits and restrictions, other than a subsidy in bonds, as were provided in respect of the original route, and then urges that the subsequent construction of this line of railroad via Denver to a connection with the main line of the Union Pacific at Cheyenne was in accord with this authorization, and that a right of way 400 feet in width through the public lands was one of the benefits which attended this departure in route. If the first branch of this contention be sound, it does not admit of any doubt that the other branch also is sound; and if both be sound, it is altogether clear upon this record that the appellee is entitled to the entire strip now in controversy, that its title thereto dates from the passage of the act of 1864, when the Eastman tract was concededly within the category of public lands, and that its title is not affected by the fact that the full width of the strip has not as yet been actually occupied and used for right of way purposes. Railroad Company v. Baldwin, 103 U. S. 426; Bybee v. Oregon & California R. R. Co., 139 U. S. 663, 679; Northern Pacific Ry. Co. v. Hasse, 197 U. S. 9; Missouri, Kansas & Texas Ry. Co. v. Cook, 163 U. S. 491, 497; Northern Pacific R. R. Co. v. Smith, 171 U. S. 260, 275; Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, 272; Kindred v. Union Pacific R. R. Co., 94 C. C. A. 112, 118, 168 Fed. 648, 654. Therefore the first branch of the contention is the one which is principally to be considered. To sustain it, the appellee relies upon Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry. Co., 97 U. S 491, 494, where it was held that the amendatory act of 1864 "authorized the plaintiff (the predecessor of the appellee here) to construct its road and telegraph line so as to connect with the Union Pacific road at a point west of its initial point (the 100th meridian),

in case it deemed such westward connection more practicable or desirable;" and also relies upon United States v. Kansas Pacific Ry. Co., 99 U. S. 455, 457, where it was held:

"The authority of the company to extend its road west of the one hundredth meridian was derived from the ninth section of the act of 1864, which declared as follows: (Quoting what is hereinbefore set forth). It thus appears that whilst the company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension. It is found by the court that the company actually extended its road westward as far as Denver, 245 miles west of the one hundredth meridian; but did not complete the same to that point, so as to be accepted by the President, until the 19th of October, 1872. * * * From a careful examination of the statutes relating to the subject, we are of opinion that, *whilst, as to the entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act'* (Italics are ours), and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the five per cent of the net earnings is only demandable on the net earnings of said portion."

What was thus said seems to be decisive of the question, but were the question an open one, we should resolve it in the same way, because of the very plain language of section nine. The Attorney-General seems also to have resolved it in this way, for in an opinion given to the Secretary of the Interior on April 16, 1866, 11 Op. A. G. 462, he said:

"Now in reading these statutes, * * * we must further read the ninth section of the act of 1862, amended by the provision of the ninth section of the act of 1864, just cited, as if it had enacted that the company in question might construct a railroad from the mouth of the Kansas River to the initial point of the Union Pacific Railroad, on the 100th meridian, or construct its road so as to connect with that railroad at any point westwardly of its initial point. That was the option, it would seem, intended to be conferred by Congress upon the present company."

And like views were expressed during the debates upon the later act of 1866. Thus, the chairman of the committee on Pacific Railroads, who was in charge of that bill in the Senate, said, in explaining the purpose of its first section, Cong. Globe, 39th Cong., 1st Sess., p. 3256:

"By the act of 1862 all these eastern branches of the main stem were required to unite with the main stem on the one hundredth degree of longitude. Such was the effect of the act of 1862 incorporating the Union Pacific Railroad Company. But by the act of 1864, amending the original charter of the company, it is provided that any of these branches may unite with the main stem at a point

west of the one hundredth meridian, if they shall see fit to do s
In this connection I will call the Senator's attention to the nin
section of the act of 1864. He will find it in the second provi
contained in that section:

"'And provided further, That any company authorized by th
act to construct its road and telegraph line from the Missouri Riv
to the initial point aforesaid'—

"That is the one hundredth degree of longitude—'may constru
its road and telegraph line so as to connect with the Union Paci
Railroad'—

"That is the main stem—'at any point westwardly of such initi
point, in case such company shall deem such westward connecti
more practicable or desirable; and in aid of the construction of
much of its road and telegraph line as shall be a departure from t
route hereinbefore provided for its road, such company shall
entitled to all the benefits and be subject to all the conditions a
restrictions of this act: Provided further, however, That the bon
of the United States shall not be issued to such company for a great
amount than is hereinbefore provided, if the same had united wi
the Union Pacific Railroad on the one hundredth degree of long
tude; nor shall such company be entitled to receive any great
amount of alternate sections of public lands than are also here
provided.'

"It will be seen from that that the privilege of making the jun
tion at a point west of the one hundredth degree of longitude h
been secured to all these companies for some two years past. No
in regard to the Pacific railway, eastern division, it was required
the statute that that branch, known as the Kansas branch, shou
locate its route within a given period of time, which period h
elapsed, and the object of the first section of this bill is simply
extend to that branch the right of locating its route until the fi
of December next; but the first section requires positively, in e
press terms, that the eastern division shall form a junction with t
main stem of the Union Pacific Railroad Company at some poi
not more than fifty miles west of the meridian of Denver. The
are not, therefore, at liberty to extend their route to a point furth
west than fifty miles west of Denver without forming a junctio
with the main stem. Whether they will form a junction at th
point, or east of that point, is not perfectly certain. It depends upo
their interests, of course, at what point they will form the junctio
but they are required positively, by law, to form the junction, so th
the eastern division may operate at all times as a feeder to the mai
trunk, the Union Pacific railroad proper. The first section,
amended, contains further language guarding against any misco
struction of existing statutes upon the subject. It declares—

"'That said company shall be entitled to only the same amount
the bonds of the United States to aid in the construction of their li
of railroad and telegraph as they would have been entitled to if the
had connected their said line with the Union Pacific railroad on th
one hundredth degree of longitude, as now required by law.'

"So it gives to the eastern division, in reference to subsidie

precisely the same right that it always has possessed, and no further right—nothing more. They will not be entitled to a dollar by way of subsidy for any part of their route west of the one hundredth degree of longitude. The committee has been extremely careful so to word the bill as to save to the Government and the public that right."

And Mr. Stevens, who was in charge of the bill in the House, said, in the course of a like explanation, Ibid, 3422:

"The Union Pacific Railroad starts from an initial point upon the one hundredth degree of longitude to be fixed by the President, a point which never has been fixed. The various branches—the Omaha road and the Kansas road—were originally to unite on that initial point with that railroad, and they were to unite within certain points on the banks of the Kansas and of the Platte. * * * Sometime after, in 1864, application was made to the House to allow any one of these branches that chose to do so to unite with the Union Pacific railroad anywhere they chose west of the one hundredth degree of longitude, provided they received no more bonds than if they went to the one hundredth degree. The act of 1864, which I hold in my hand, gave either of these branches a right to unite with the Union Pacific railroad and go westward as far as they pleased without reference to the initial point, provided they should have no more than $16,000 per mile up to the one hundredth degree."

But the appellants contend with much earnestness that no such change in the route or western terminus of this road was authorized by section nine of the act of 1864, because the language of that section was restrained by section twelve, and because the act of 1866 treated or construed the act of 1864 as leaving the point of connection with the main line of the Union Pacific as fixed in the original act of 1862. We can not assent to either branch of this contention. Whilst the provision in section twelve, "And the said railroad from the mouth of the Kansas River to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas River opposite said towns," if taken alone, gives rise to an implication that the western terminus was to be on the 100th meridian, the implication is too slight to overcome or restrain the pain and direct language of the provision in section nine. These provisions, separated as they are, relate to distinct subjects; one to the location of the western terminus, and the other to the location of a portion of the road near the eastern terminus. Each is specific in respect of its particular subject, is designed to be controlling to that extent, and can be given full effect without impinging on the other. We regard them as accurately described, for present purposes, by saying: Both contemplate a connection with the main line of the Union Pacific as far westward as the 100th meridian; one expressly provides that this connection may be made farther westward, if the company deems a more westwardly connection more practicable or desirable, and the other merely requires that in locating the road east of the 100th meridian it shall be made to pass through, or only across the river from, Lawrence

and Topeka, which are near the eastern terminus and in almost a direct line to the west.

And whilst the other provision in section twelve, "And if the Union Pacific Railroad company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee and Western Railroad company, now known as the Union Pacific Railroad Company, Eastern Division, shall have completed their road to the 100th degree of longitude, then the last named company may proceed to make said railroad westward until it meets and connects with the Central Pacific Railroad company on the same line," if taken alone, gives rise to a like implication, the same is more than dispelled when the provision is contrasted with the clear and specific language of section nine, and particularly when due regard is had for the fact that the former does not lay any duty upon the company, in respect of the western terminus or otherwise, but only gives it, in a stated contingency, an option to proceed to a connection with the Central Pacific, instead of connecting with the Union Pacific. This option in no wise militated against the existence or exercise of the other option given in section nine.

So understood, as we think they must be, neither of the provisions in section twelve is in conflict with or operates to restrain the one in section nine.

The other branch of the contention has reference to the provision in the first section of the act of 1866, "Provided, that said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific railroad on the one hundredth degree of longitude as now required by law," and turns upon the proper application and purpose of the concluding words "as now required by law." If they apply to and explain only what follows the subjunctive "if," as is asserted by the appellants, they indicate that Congress regarded the clear and explicit language of section nine of the act of 1864 as meaningless; but if they apply to and explain the entire provision, as is asserted by the appellee, they indicate merely that Congress was being careful to perpetuate the requirement expressed in the other provision of section nine, "Provided, further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude." The latter view is in our opinion the correct one. It properly accords to Congress a correct appreciation of prior legislation, which the former view does not do, and it also conforms to the settled rule that statues couched in clear and explicit language are not to be deemed overthrown by possible, but not necessary, implications flowing from after legislation. Great Northern Ry. Co. v. United States, 84 C. C. A. 93, 109, 155 Fed. 945, 961; Oakes v. United States, 97 C. C. A. 139, 143, 172 Fed. 305, 309. These considerations persuade us that the provision in the act of 1866 has the same meaning as if it read:

'Provided, That, as now required by law, said company shall be ntitled to only the same amount of the bonds of the United States o aid in the construction of their line of railroad and telegraph as hey would have been entitled to if they had connected their said ine with the Union Pacific railroad on the one hundredth degree of ongitude." And this view is strengthened by the succeeding pro- ision, "And provided further, That said company shall connect heir line of railroad and telegraph with the Union Pacific railroad, ut not at a point more than fifty miles westward from the meridian f Denver in Colorado," because its terms, taken in their natural ignification, are restrictive rather than creative or expansive, and re indicative of a purpose to limit or confine an existing option or rivilege.

Finally, the appellants rely upon the recent decision in Union Pacific Railroad Co. v. Harris, 215 U. S. 386, 30 Sup. Ct. Rep. 138, s definitely holding that the authority of the company to extend ts road west of the 100th meridian was derived from the act of 1863, nd not from the act of 1864. Of course, if that decision be as tated, it must be followed in this case. But it is not enough that t may contain language giving color to the appellants' contention, or to overcome the prior rulings in Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co. and in United States v. Kansas Pacific Ry. Co., supra, it must appear that there was a purpose to depart from them. The facts in the Harris case were these: In 1861 one Blou initiated a pre-emption claim to a tract of public land west of the 100th meridian by settling upon the tract and filing the requisite declaratory statement; in 1865 he transmuted the claim into a homestead entry (which he lawfully could do without break- ing the continuity of the claim or losing the right to have the title when perfected relate back to the initiation of the claim. Ross v. Sinclair, Copp's Public Lands, 318; Watson v. Ry. Co., 3 Land Owner 7; In re Edward Young, 9 Land Dec. 32; Ames v. Bales, 17 Land Dec. 547); in 1870 he made final proof under the homestead law, and in 1872 he received a patent. After the initiation of the claim and prior to the making of final proof, the railroad via Den- ver to Cheyenne was located and constructed across the tract, and thereafter a controversy arose as to whether a right of way thereover was granted by the Pacific Railroad acts. As the right of way granted by them was confined to "public lands" and as the tract was not in that category when any of those acts was passed or at any time thereafter, it would seem that the decision could not have been otherwise than against the railroad company, no matter which act authorized the extension of the road west of the 100th meridian. But in the opinion it is said:

"Any possible rights of the railroad company in this land com- mence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it. True, as held in (citing cases), the grant of the right of way is absolute, and takes effect as of the date of the

grant. But that date must be found in an act prescribing the finally adopted route."

And yet the opinion does not mention the provision in section nine of the act of 1864 or the earlier decisions wherein it was considered and held to be the source of the company's authority to extend its road west of the 100th meridian. This suggests that that provision and those decisions were not in the mind of the court when the opinion was rendered, and the suggestion becomes stronger when it is reflected that it is not at all the practice of that court to depart from its prior rulings either lightly or sub silentio. Not only so, but any element of improbability that otherwise might inhere in the suggestion is eliminated when it is stated, as is the case, that the provision in question appears at an obscure place in the act of 1864, that the prior rulings thereon were made more than 30 years ago, and that the printed brief for the railroad company in that case, a copy of which we have examined, made no mention of that provision or of those rulings. In these circumstances, we think it is not a fair inference from the opinion that there was any purpose to depart from those rulings, The Victory, 6 Wall. 382, 384; Langford v. Monteith, 102 U. S. 145, 147, and we therefore give effect to them.

It results, upon this record, that the appellee has a right of way 400 feet in width, being 200 feet on either side of the center line of its main track, across the tract in question, and that its title thereto must be regarded as effective from the date of the act of 1864, which preceded by almost two years the initiation of the title which the appellants are asserting.

But as the bill sought to have the title to the entire tract quieted in the appellants and as the appellee did not disclaim so much thereof as is outside of this right of way, the decree, instead of dismissing the bill, should have recognized the appellee's title to the right of way and have quieted in the appellants the title to the remainder.

The decree as entered is reversed with a direction to the circuit court to enter a decree embodying the change just mentioned, the costs in this court to go against the appellee and those in the circuit court to be equally divided.

Filed May 2, 1910.

(Decree.)

And on the second day of May, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

No. 3033.

THOMAS B. STUART and CHARLES A. MURRAY, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Colorado.

MONDAY, *May* 2, 1910.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that Thomas B. Stuart and Charles A. Murray have and recover against the Union Pacific Railroad Company the sum of Two Hundred Seventy and 95/100 Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter a decree in conformity with the views expressed in the opinion of this Court and to the effect that the costs in the Circuit Court be equally divided between the parties.

May 2, 1910.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit (except the transcript of the record from the Circuit Court of the United States for the District of Colorado), in a certain cause in said Court wherein Thomas B. Stuart and Charles A. Murray are Appellants, and the Union Pacific Railroad Company is Appellee, No. 3033, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighth day of July, A. D. 1910, a mandate was issued out of said Circuit Court of Appeals in said cause directed to the Judges of the Circuit Court of the United States for the District of Colorado.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of August, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Thomas B. Stuart and Charles A. Murray are appellants, and Union Pacific Railroad Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal — the Circuit Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

In the Supreme Court of the United States of America.

No. 694. October Term, 1910.

THOMAS B. STUART and CHARLES A. MURRAY, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Stipulation.

The appellee, Union Pacific Railroad Company, hereby acknowledges due, legal and proper service of the writ of certiorari allowed and issued herein by the Supreme Court of the United States, on the 18th day of October, A. D. 1910.

And it is further agreed that the certified transcript of the record of this cause, already filed in the office of the Clerk of the Supreme

Court of the United States, may be taken and treated as a return to the aforesaid writ, and that the Clerk of the Circuit Court of Appeals may so certify.

Witness our hand at Denver, Colorado, this 24th day of October, A. D. 1910.

MAXWELL EVARTS,
Attorneys and Solicitors for Union Pacific Railroad Company.
THOMAS B. STUART,
CHARLES A. MURRAY,
LOUIS T. MICHENER AND
PERCY G. MICHENER,
Attorneys and Solicitors for Appellants.

(Endorsed:) No. 3033. In the United States Circuit Court of Appeals for the Eighth Circuit. Thomas B. Stuart and Charles A. Murray, Appellants, vs. Union Pacific Railroad Company, Appellee. Stipulation as to return to writ of certiorari. Filed Nov. 11, 1910. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Thomas B. Stuart and Charles A. Murray, Appellants, vs. Union Pacific Railroad Company, No. 3033, is a full true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eleventh day of November, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 22,315. Supreme Court of the United States, No. 694, October Term, 1910. Thomas B. Stuart and Charles A. Murray vs. Union Pacific Railroad Co. Writ of Certiorari. Filed Nov. 11, 1910. John D. Jordan, Clerk.

[Endorsed:] File No. 22,315. Supreme Court U. S., October Term, 1910. Term No. 694. Thomas B. Stuart and Charles A. Murray vs. Union Pacific Railroad Co. Writ of certiorari and return. Filed November 14, 1910.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 135.

THOMAS B. STUART AND CHARLES A. MURRAY,
PETITIONERS AND APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY, RESPONDENT AND APPELLEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

COMMENTS OF RESPONDENT-APPELLEE ON BRIEF AMICI CURIAE.

Statement.

On the eve of the oral argument we are confronted by a brief proposed to be filed by the city attorney of Greeley, Colorado, as *amicus curiæ* "for the purpose," as the brief (p. 1) naively states, "of making friendly suggestions to the court in the case at bar touching important interests in the

State of Colorado" relative to the questions assumed to be involved. What the brief really aims to do is to call the attention of the court to another case now pending here to which the city of Greeley is a party, and the assertion is made that the questions there involved are the same as those presented in the instant case. With this assertion we take issue, and if it be substantially unfounded, then, we respectfully submit, the brief of the friend of the court is without valid excuse.

Mr. Ewing protests that he does not intend at this time to argue the Greeley case. Notwithstanding this disavowal, he proceeds to do what he says he will not do. Pages 5 to 18 of his brief are devoted to statements of what he claims are the issues involved and the facts presented upon the record in the Greeley case. He admits frankly (pp. 15 and 18) that he took an inconspicuous part in that litigation. Doubtless this accounts for the many inaccurate and misleading statements which his brief contains. We admit and emphasize the impropriety of now arguing the Greeley case, but we cannot, in justice to the court as well as to our client, leave undenied false statements, however innocently made, or fail to correct false impressions, which the uninformed attempt to create.

I.

What is Involved in the Greeley Case.

Shortly prior to the bringing of that suit the city of Greeley undertook by ordinance to grant to certain railroads the right to lay, maintain, and operate numerous railroad tracks across and along certain streets of the city. These tracks if constructed would for more than two miles have lain almost entirely within 200 feet of the main track of the Union Pacific Railroad Company, and therefore within the limits of its right of way granted by act of Congress. Moreover, such tracks would have lain between the city itself as

built and the tracks and facilities, including the freight and passenger depots, team tracks, and other like structures of the Union Pacific, thus practically ostracizing the latter company so far as business with the inhabitants of Greeley and vicinity was concerned. Much of the rights of way described in said ordinances lay wholly within spaces which the city of Greeley had theretofore been permitted to use as streets. All of the rights of way attempted to be granted to some of said companies lay within such areas. Two of the companies named as grantees in the ordinances purchased from private claimants intervening strips of land to complete said rights of way and make them continuous. For the most part said strips so purchased lay within 200 feet of the main track of the Union Pacific. All of said purchases were made with constructive notice of the Union Pacific's claim. To a large extent they were made with actual notice thereof.

At about the same time the city of Greeley set up the claim that the Union Pacific could not without consent of the city lay additional tracks when needed within the limits of the right of way, if also within a space shown on the plat of Greeley as a street, even though never used for that purpose. Upon this theory the city attempted to prevent the company from laying tracks within 50 feet of its main line. Thereupon the Union Pacific filed its bill in equity for an injunction to prohibit the city from interfering with the laying of said tracks, upon the theory that within the railroad's 400-foot right-of-way strip the city's right to the use of the streets arose from implied dedication only—that is, as to the streets and alleys shown upon the Union Colony's map of Greeley but never opened or used, no such dedication had occurred, and that as to those streets which had actually been used the easement of the public "is undoubtedly subservient to the exigencies of railroad use, and the public takes the dedicated crossing subject to the inconveniences which may result from the increase of traffic and transporta-

tion along the line of the road and the necessity of laying more tracks thereupon."

Northern Pacific *vs.* Spokane (C. C. A., 9th Circuit), 64 Fed., 506-509 (a case involving the Northern Pacific grant and decided before Northern Pacific *vs.* Townsend, 190 U. S., 267 and 272).

The Union Pacific asserted the right to lay more tracks as needed without the consent of the city, but only upon the condition that the use of the streets by the public was not thereby destroyed or seriously or unnecessarily impaired. The Union Pacific also asserted that by the implied dedication the city got no title to the street spaces and acquired no right to grant the use thereof to other railroad companies for railroad purposes. Consequently the other railroad companies to which the city had assumed the right to make such grants were made parties defendant, and it was sought to prevent them by injunction from constructing the proposed railroads and laying the proposed tracks, which if constructed and laid would have extended for a distance of more than two miles—from one end of the city to the other—within said 400-foot strip, and between the Union Pacific and the city itself.

No attempt was made or involved to close up any of the streets of the city. On the contrary, it was expressly conceded that the public might continue to use the same for ordinary street purposes.

No attempt was made or involved to take away any of the land or destroy or confiscate any of the improvements claimed by the innocent, but misguided, citizens of Greeley, whose woes are so eloquently pictured by Mr. Ewing. Indeed no such persons were parties to the suit, nor could any of their rights be adjudicated.

At the time of the passage of the acts of 1862 and 1864 all of the land involved was public and unappropriated. At the date of the act of 1866 all of the land was public and

unappropriated except a very small segment at the extreme north—so small as to be unimportant.

Even when the Denver Pacific act was passed on March 3, 1869 (15th Stat., 324; Pacific R. R. Laws, 87), a large part of the land was still public and subject to disposition by Congress.

The railroad was built and in operation prior to January 1, 1870, before Horace Greeley or the Union Colony acquired any of the lands and before the city or town of Greeley or any other town or settlement at that point was even thought of.

The railroad never joined or concurred in any of the plats of Greeley and made no express dedication of streets thereon shown within its right of way. The right of the public, therefore, within the right of way arose from permissive use and applied only when use had occurred.

Many of the streets and most of the alleys shown on said plats were never opened or used at all within said right of way.

Except for the deed to Horace Greeley (Ewing's Brief, page 7) the railroad company never attempted or pretended to convey any of its right of way. The Greeley deed purported to convey all but a 200-foot right of way—*i. e.*, it conveyed the outer 100 feet on either side. But its effect is limited to a very small segment out of the total involved in the Greeley case, and even at that point the city was asserting absolute dominion within the reserved 200 feet, and the defendant railroads were about to lay tracks within said space, acting by authority of the city.

Neither the Union Pacific nor any of its predecessors ever made any agreement limiting its right of way at Greeley. The making by the Union Colony of a deed for a less width than 400 feet (Ewing's Brief, page 8) constituted no agreement by the railroad that it would not assert its full rights under its paramount title.

Bybee *vs.* Oregon & California Railroad Company, 26 Fed., 586.

Same case, 139 U. S., 663.

The fact that payments were made to claimants within the right of way (Ewing Brief, page 9) is without significance. It may have been done by way of compromise to get rid of squatters' claims, or the payments may have been for improvements. The company may have desired to avoid litigation, which, however, was finally forced upon it. In any event, the small parcels to which the payments referred were no part of the land involved in the Greeley suit.

The tracks authorized by ordinances mentioned on pages 9 and 10 of Mr. Ewing's brief were in very slight measure within the 400 feet. It is not true, as stated on page 10, that all or any considerable number of persons signing consent to one of said ordinances were claimants within the 400 feet.

It is true that in some parts of Greeley, but within a very limited area, buildings have been constructed which lie in whole or in part within the 400 feet, but this obtains as to a very small part of the total right of way through the town. The buildings for the most part are warehouses, mills, and other like structures whose uses require that they should abut on railroad tracks. The lands so occupied are not involved in the Greeley case, and none of the owners or claimants of said lands or structures—indeed no private owners or claimants—are attacked in that lawsuit.

As to the strips of ground actually involved in the case, there are not now and never were any buildings or structures of any consequence thereon. Such as ever existed there were of such small dimensions, occupied so slight an area of the total involved, and infringed upon the right of way to such a slight degree, as to be negligible. In the main, the strips of land involved in the Greeley case are now and always have been vacant and unoccupied.

Except the Greeley, Salt Lake and Pacific, which was built by the Union Pacific and had a few tracks for a short distance within the 400 feet, no railroad except that of the Union Pacific was ever laid within the strip, whether with or without the consent of the city, prior to the attempt which caused the litigation.

The Union Pacific did not and does not, by said suit or otherwise, seek to disturb the public utilities of Greeley, such as sewers, water mains, wires, and other like structures.

The Greeley & Denver Railroad Company (Ewing's Brief, page 12) never purchased any land within the Union Pacific's right of way, but relied solely upon the city ordinance purporting to grant easements in the streets.

The Denver, Laramie & Northwestern (acting through the Greeley Terminal Company, a subsidiary corporation) and the Chicago, Burlington & Quincy did expend some money in buying strips of land from individual claimants within said 400 feet to fill out and complete rights of way in part provided by the attempted street grants made by said ordinances (Ewing's Brief, page 13).

But all of these purchases were made with at least constructive notice of the Union Pacific's title, and most of them were made and the major part of the purchase price paid after actual notice of the Union Pacific claim.

And, finally, it is not true, as intimated throughout the brief of the Friend of the Court, that the Union Pacific's claim is an eleventh-hour contention hitherto concealed, but now suddenly resurrected to the dismay and general consternation of the public of Colorado. On the contrary, as appears from the agreed statement of facts in the Greeley case, throughout the State of Colorado, on the line of the Denver Pacific as well as the Kansas Pacific, the company and its predecessors have everywhere continuously, from the beginning, claimed the full 400 feet as granted by the act of 1864, and have made their claims publicly known by litigation and otherwise, and the title is everywhere conceded and recognized, except in a few isolated cases such as that of Stuart and Murray and that at Greeley.

We confidently submit that the Greeley litigation does not involve the rights, present the questions, nor exhibit the facts which Mr. Ewing professes to believe it does.

We further confidently submit that the case at bar presents

no question which is of material importance in the Greeley litigation.

If we are correct in this, the brief which *Amicus Curiæ* presents is without excuse.

The Greeley case involves the act of March 3, 1869, relating to the Denver Pacific.

The case at bar, involving the right of way of the Kansas Pacific, is not affected by the act of 1869.

Practically the sole question under the acts of Congress presented in the case at bar is whether the grant of right of way was made by the act of 1864 or that of 1866, but, as heretofore pointed out, it makes little difference to the Greeley case which of these is the effective date. In 1864 all the lands at Greeley were public; in 1866 all but one insignificant parcel.

Strangely enough this, which is the only question common to the two cases, is not discussed at all by the Friend of the Court.

II.

Equitable Estoppel not Involved in Case at Bar Either by Pleading or by Proof.

The Friend of the Court earnestly endeavors to show a similarity between the Greeley case and this, by contending that the application of equitable estoppel to the claims of the railroad is involved in each. We do not admit that this doctrine is either presented or is applicable in the Greeley case. That is for future consideration. But we venture to assert with confidence that in the instant case it is neither presented by the pleadings nor supported by the proof. "An estoppel has sometimes been quaintly defined, 'the stopping of a man's mouth from speaking the truth'; and would seem in some measure to partake of severity if not of injustice."

Sprigg *vs.* Bank, 10 Peters, 257, 265.

Hence it is well settled that estoppel must be affirmatively pleaded and the allegations supported by clear proof.

Philadelphia, &c., R. R. Co. *vs.* Howard, 13 Howard, 307, 335.
Gilmer *vs.* Poindexter, 10 Howard, 257, 268.
Richardson *vs.* Boston, 19 Howard, 263, 267.
Aurora City *vs.* West, 7 Wallace, 82, 94.
Gould *vs.* Evansville, &c., R. R. Co., 91 U. S., 526, 531.
16 Cyc., 806, 807.

The cases so holding are without number. The rule is universal.

But in the case at bar the allegation was that the complainants "are the owners in fee simple absolute" (Printed Record, p. 2, fol. 3); not that defendant had the title, but that its "mouth was stopped" from asserting it.

By the answer (Printed Record, p. 15, etc.), the railroad company's title was set forth fully. Complainants did not seek to amend the bill by setting up any estoppel against the assertion of said title. On the contrary, they filed the general replication (Printed Record, p. 23). Thus the sole issue presented was the respective rank of the two titles, *i. e.*, which was prior in point of time and so prevailed over the other.

The allegation that one is the "owner in fee simple absolute" is not supported by proof that another is in fact the owner, but is prevented by estoppel "from speaking the truth."

In short, estoppel is a shield and not a sword—a weapon of defense, not offense—and it can never avail a plaintiff as the foundation of his title unless expressly so provided by statute.

It is curious to note that it remained for the *Amicus Curiæ* for the first time to discover that this case involves the doctrine of equitable estoppel. The plaintiffs below, petitioners

and appellants here, are able and experienced lawyers, and have appeared on their own behalf throughout the proceeding. Is it not surprising that this thought did not occur to them?

But even if equitable estoppel had been pleaded, and conceding *arguendo* only that the doctrine could, under any circumstances, be applicable to such a case as this, yet the evidence discloses no fact whatsoever to support such a plea. The Friend of the Court begins his discussion of this point at page 57 of his brief. The facts relied upon by him in support of the point are set forth in ten paragraphs consecutively numbered, beginning on page 58. It is manifest that the Friend of the Court has not read the record. Only complete ignorance of the facts there shown will excuse such manifest misstatement. And perhaps we may be pardoned for suggesting that even ignorance of the facts will not excuse reckless assertions made without investigation, especially when the means of investigation are at hand.

We cannot prolong this brief by repeating these mistaken assertions or quoting the record, which quite refutes them. Following the numbering employed by Mr. Ewing, we briefly refer to each.

1. (Page 58.) Entirely untrue. The railroad has for years maintained fences on both sides of the track, and snow fences beyond these on the north side about 150 feet from the track (Printed Record, p. 109, folio 170; also p. 115, folios 180, 181).

2. (Page 59.) Entirely untrue. The fences were there many years before suit begun (see references under preceding paragraph).

3. (Page 59.) The Circuit Court of Appeals found that the railroad company paid taxes on the right of way. If complainants and their predecessors also paid them, there is nothing to indicate that the railroad company knew it (178 Fed., 753, 755).

4. (Page 59.) Entirely untrue. Testimony of Tax Commissioner Scribner directly to the contrary, and shows that the railroad company paid the tax (Printed Record, pp. 122 to 127).

5. (Page 59.) The railroad company was not charged with constructive notice of the receiver's receipt or of the patent, for its title was prior in point of time. In any event, it did all that it need do, under the law as it then stood.

6. (Page 59.) The record is to the contrary. The tract was entered by Erastus Eastman January 2, 1867, and by him conveyed to John W. Iliff January 4, 1867. Title stood in Iliff and his heirs until after this suit was brought (Printed Record, pp. 2, 93, Exhibit 14).

7. (Page 60.) Plaintiffs' title was questioned as soon as asserted (Printed Record, p. 140).

8. (Page 60.) This statement is without foundation. The railroad company never acknowledged the title of petitioners, nor negotiated for its purchase (Printed Record, pp. 38, 42, 52, 53, 57, and 138 to 144).

9. (Page 60.) We have discussed the question of petitioners' possession in our former brief (see pp. 15 to 26 thereof).

We submit that they had none, but if they had had possession it could not have been adverse, in a legal sense, under the law as it then stood. Therefore the railroad company was under no obligation to take any steps.

10. (Page 60.) This assertion is in direct conflict with the evidence in the record. No such admission was ever made by the attorney for the railroad. Mr. Orahood was a witness, and his testimony will be found in the printed record at pages 138 to 144. It is unshaken by the testimony of complainants (Printed Record, pp. 38, 42, 52, 53, and 57).

It follows that even though the doctrine of equitable estoppel be important in the Greeley case, which, however, we do not admit, it certainly is not involved in the case at bar.

But even if it were the law, as it then stood, would forbid its application. (See authorities cited, p. 109, our principle brief.)

III.

Act of Congress of June 24, 1912.

At page 19 of his brief *Amicus Curiæ* analyzes the above-mentioned act as relating:

First, to conveyances and agreements;

Second, to adverse possession, and,

Third, to abandonment.

Obviously no agrement or conveyance is involved in the case at bar. Indeed, no such claim is made. But, at page 28 of his brief, *Amicus Curiæ* asserts that the present case definitely involves those parts of the act of 1912 relating both to adverse possession and to abandonment. Unless involved in one or the other of these aspects, the act is not involved at all. And our contention is that—

1. *The act is in no respect applicable to the case at bar.*

In our principal brief (pp. 15 to 26 and 106 to 109) we have discussed fully the question of adverse possession, which was the sole point urged by petitioners and appellants under the act of 1912, and have demonstrated, we hope, that nothing in the present record justifies the application of the new act of Congress in that aspect.

2. *No abandonment alleged or proved.*

But *Amicus Curiæ* suggests a thought which apparently had not occurred to the parties directly interested, namely, that there had been abandonment prior to June 24, 1912, which was validated and made effective by the act of that date.

We deny the efficacy of a subsequent act of Congress to make that abandonment, which was not such at the time it occurred. We further deny that the present record contains anything which could even under ordinary circumstances sustain a finding that any part of this right of way had been at any time abandoned. Abandonment, like equitable estoppel, must be specially pleaded, and there is no such plea. It "consists in the intention to abandon and the external act by which the intention is carried into effect."

Lindblom *vs.* Rocks, 146 Fed., 660, 663, 664; 77 C. C. A., 86.

Abandonment of a property right is always a question of intention; whether nonuser is evidence of intention depends upon circumstances.

Atlanta, K. & N. Ry. Co. *vs.* Southern Railway Co., 153 Fed., 122, 125; 82 C. C. A., 256.

"There cannot be any abandonment of property while the party is in possession of any part of it."
Eisele *vs.* Oddie, 128 Fed., 941, 947.

Abandonment must be clearly established by party relying upon it.

North American Exploration Company *vs.* Adams (C. C. A., 8th circuit), 104 Fed., 404, 405 to 407.

Whether there has been an abandonment is a question of fact, to be determined by the acts and intention of the person against whom it is alleged. Mere lapse of time during which there is nonuser is not sufficient. The circumstances must be such as to justify an inference of intention to abandon.

Alamosa Creek Co. *vs.* Nelson, 42 Colorado, 140, 143, 144.

Phillips *vs.* Hamilton (Wyo.), 95 Pac., 846, 848.

Whitman *vs.* Muskegan Log Co., 116 N. W., 614, 616; 152 Mich., 645.

Lorich *vs.* Southern Ry. Co., 68 S. E., 931; 87 So. Carolina, 71.

Buck *vs.* Louisville & Nashville R. R. Co., 53 Southern, 1008, 1009.

Featherman *vs.* Hennesy, 113 Pac., 751, 753; 42 Montana, 535.

1 Cyc., 4, 6.

"It is a familiar principle of law that the mere failure to occupy a right of way without other circumstances to show abandonment or failure of the purpose for which the way is granted, will not operate to divest the title of the owner thereof."

Townsend *vs.* Mich. Central, 101 Fed., 757, 760 to 762; 42 C. C. A., 570.

Applying the foregoing doctrines, which are well settled, we submit that there is absolutely no proof from which abandonment could be inferred. True, the railroad company has for many years maintained post-and-wire fences distant fifty feet on either side of its track. The object of these fences was to comply with a statute of Colorado to prevent ranging stock from straying upon the track. This is explained in our principal brief (see pages 105 and 106 thereof).

The reason they were placed upon the fifty-foot line instead of further from the tracks is clearly shown by the testimony of the superintendent, Mr. Vick Roy (Printed Record, p. 113). The fact that the railroad company did not intend thereby to abandon the land outside of the fences is convincingly shown by the circumstance that continuously for more than twenty-five years, and up to the present day, the railroad company and its predecessors have maintained elaborate structures outside of the fences intended to guard against snow. These were distant about one hundred and fifty feet from the track (Printed Record, p. 109, fol. 170; p. 115, fol. 180; p. 98, fol. 151; p. 99, fol. 153; also Exhibit A, a copy of which is attached to this brief).

Indeed, the construction and continued operation even of single railroad track "is an assertion of right to the entire dth of its right of way," and is "the defiant badge of own-ship" of the whole 400 feet which the acts of Congress pur-rt to grant (see authorities cited at pp. 22, 23, 105, and 6 of our principal brief).

In Northern Pacific *vs.* Smith (171 U. S., 261-275) this urt said: "By granting right of way 400 feet in width Con-ess must be understood to have conclusively determined at a strip of that width was necessary for a public work of ch importance," to which language this court, in Northern acific *vs.* Townsend (190 U. S., 267 at 272), later added: Neither courts nor juries, therefore, nor the general public ay be permitted to conjecture that a portion of such right way is no longer needed for the use of the railroad, and le to it is vested in whosoever chooses to occupy the same."

In Kindred *vs.* Union Pacific, 168 Fed., 648 at 653, the ircuit Court of Appeals, 8th Circuit, made use of like lan-uage, to which it added: "That for a long time it main-ined its right-of-way fences within the exterior limits of e strip, gave the adjacent land-owners nothing more than permissive use of the unenclosed portions." And that de-sion of the Circuit Court of Appeals was recently affirmed y this court.

Kindred *vs.* Union Pacific, 225 U. S., 582.

How then can it be said that by any act or omission of e railroad, charged as having occurred prior to June 24, 912, its intention to abandon any of the width of right of ay so conclusively determined to be necessary, could be videnced? The railroad was entitled to rely upon such nclusive determination, notwithstanding any conjecture to e contrary indulged in either by courts, juries, or the gen-al public, and as a consequence could safely leave them to ake such conjectures as they might see fit. Whether this ondition is changed by the act of June 24, 1912, is another

question. But we respectfully submit that prior to the date of that act no abandonment had occurred or could occur by virtue of any of the things mentioned in the brief of the Friend of the Court.

3. *Subsequent statutes cannot convert into abandonment or equitable estoppel previous acts or omissions innocuous when they occurred.*

This point is fully discussed in our principal brief in considering the question of adverse possession (see Fifth Point thereof, pp. 124 to 140).

The principle is the same when we consider the act of 1912 as applicable to equitable estoppel or abandonment. Upon the argument contained in our principal brief we rest the assertion set forth in the foregoing headline.

4. *If the act of* 1912 *is retroactive its validity in that aspect is not aided either* (*a*) *by the power reserved in the original act of* 1862, *to "add to, alter, amend, or repeal," or* (*b*) *by the language of this court in Northern Pacific vs. Townsend,* 190 *U. S.,* 267, 271, *that "the grant was of a limited fee made on an implied condition of reverter" in a certain event.*

(*a*) *Amicus Curiæ* relies upon the reservation, contained in section 18 of the act of July 1, 1862, "That Congress may at any time, having due regard for the rights of said companies, named herein, add to, alter, amend or repeal this act."

This precise provision of the act in question has been under consideration by this court.

Sinking Fund cases, 99 U. S., 700, 718.

United States *vs.* Union Pacific, 160 U. S., 1, 33.

The opinions in these cases are quoted from at length in our principal brief (see pages 131, 132, 133 thereof). Upon what is there said we rest the contention.

(*b*) But it is said by the Friend of the Court that the right of way is not a vested property right, as was the title to the odd-numbered sections granted or the right to the bonds offered in aid of the enterprise, and reliance is had upon certain language in the opinion of this court in Northern Pacific *vs.* Townsend, 190 U. S., 267. But surely *Amicus Curiæ* must be mistaken in this. The Government aid granted consisted of three things: First, the right of way granted by section 2 of the act; second, the odd-numbered sections granted by section 3 of the act; third, the bond aid granted by sections 5 and 11 of the act (references to the act of 1862). And the grant of right of way was not the least important of the three.

The language of section 2, granting the right of way, was as follows:

> "That the right of way through the public lands be, and the same is, hereby granted to said company for the construction of said railroad and telegraph line * * * said right of way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass over the public lands," etcetera * * *. "The United States shall extinguish, as rapidly as may be, the Indian titles to all lands falling under the operation of this act and required for the said right of way and the grant hereinafter made."

The language of this grant was no different from that in which the grant of odd-numbered sections made by section 3 was framed, save that by section 3 there were certain exceptions and reservations from the grant, whereas none occurred in section 2 in respect of the right of way. The language imported a present absolute grant, in fee, without exception or reservation, and it has been repeatedly so con-

strued. The title vested as of the date of the passage of the effective. (See authorities cited in our Principal Brief, p. 53.)

The nature of the title conveyed by such an act of Congress was further considered by this court in—

> New Mexico *vs.* United States Trust Company, 172 U. S., 171.
>
> See also Western Union Telegraph Company *vs.* Pennsylvania Company, 195 U. S., 540, at 570.

The act making the grant contained no express condition. If any such condition existed, it was implied. Moreover, since the title vested forthwith upon the passage of the act, such condition, if it existed, was a condition subsequent. Indeed the excerpt from the opinion in the Townsend case (190 U. S., 267), relied upon by the Friend of the Court, concedes that the grant was in fee, the language being

> "In effect the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

It is contended that the event has occurred which brings into operation said implied condition of reverter because the company has not occupied all of the 400 feet with its tracks and other railroad structures. But we respectfully submit that the court in the Townsend case did not intend to hold that longitudinal strips of this 400-foot right of way, along the outer edge thereof, should revert to the United States simply because for a period of years the occasion had not arisen which made it necessary for the railroad company to lay additional tracks occupying the entire area. The obvious meaning, as it seems to us, of the Townsend decision is, that the implied condition of reverter is to operate in the event that the company should altogether cease to use or retain a definite portion of the entire 400-foot strip for the purposes for which it was granted. In other words, so long

as even one railroad track and telegraph line has been constructed and is being operated through said strip of land, in the manner, and for the purposes designated by the acts of Congress, there is no failure to use or retain any portion thereof for the purpose for which it was granted. And this was clearly recognized and definitely determined in the Townsend case itself. For example, the court says:

> "But although there was a present grant it was yet subject to conditions expressly stated in the act and also (to quote the language of the Baldwin case, 103 U. S., 426), 'to those necessarily implied, such as that the *road* shall be used for the purposes designed.' Manifestly the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof * * *."

(Here follows the excerpt relied upon by *Amicus Curiæ*. Then the court proceeds:

> "This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly."

Evidently it was argued there, as it has been here, that the railroad company had no use for the outer portions of the 400-foot strip, had never devoted them to any railroad purpose, and had, therefore, in effect, abandoned them, and thus submitted them to the operation of the State statute relating to adverse possession. But the court said:

> "Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress."

(Here follows the quotation from Northern Pacific *vs.* Smith, hereinabove set forth.)

The court then proceeds:

> "Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. * * * Congress having plainly manifested its intention that the title to and possession of the right of way should continue with the original grantee, its successors and assigns, *so long as the railroad was maintained,* the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad."

A fortiori must it be true, as it seems to us, that the mere fact that the railroad company has for a period of years failed to lay its tracks or place other railroad structures to the uttermost limits of the 400 feet cannot operate as an abandonment which may vest the title in third persons or revest it in the United States. The act contains no condition, either express or implied, that all parts of the right of way should be occupied with tracks within a certain period of years. The sole condition was that the railroad should be constructed thereover and operated under the conditions and for the purposes contemplated by the act. It follows that there has been no breach of any condition; the event upon which reverter to the United States depended has not occurred, and Congress is wholly without power to declare a forfeiture or legislate a reversion.

5. Extracts from the Congressional Record do not strengthen the argument.

Pages 43 to 57 of Mr. Ewing's brief are devoted to copious extracts from the Congressional Record, consisting of colloquies between the general solicitor of the Union Pacific and members of the Judiciary Committee of the House, and extracts from the reports of the Judiciary Committees of the House and Senate relative to the bill which finally resulted in the act of June 24, 1912. We have read these extracts with interest. They may have importance as matters of general information. But, after careful consideration, we are wholly unable to perceive that they throw any light whatever upon the questions here at issue.

IV.

Contention Unfounded that Appellee in its Principal Brief Has Assumed False Premises or Made Inaccurate Statements of Fact.

Beginning on page 66 and continuing thence to the end of his brief, the Friend of the Court undertakes to point out the particulars in which, as he asserts, the appellee in its principal brief has assumed false premises or made inaccurate statements of fact. We have exercised the utmost care to be accurate in our statements. In each instance where a statement of fact has been made we have, both in this brief and in our principal brief, cited the portions of the record in which the evidence, the undenied allegation, or the stipulation appeared justifying, as we thought, our assertion. As to whether we have made any misstatement or advanced any false premise of fact, we must leave the court to judge after reference has been had to the portions of the record mentioned.

But, upon analysis, the complaint made is not so much that our premises have been false as that our deductions are illogical or our conclusions unsound. In this aspect the points presented in the concluding portion of Mr. Ewing's brief have been fully discussed in our principal brief, and we rest upon that.

Respectfully submitted,

CLAYTON C. DORSEY,
Of Counsel for Respondent and Appellee.

9

Supreme Court, U. S.
FILED.
DEC 3 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 185.

THOMAS B. STUART and CHARLES A. MURRAY,
Petitioners and Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT AND APPELLEE.

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Exhibit "A"—Blue Print showing Union Pacific track and right of way. Inside cover page at end of brief.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 135.

THOMAS B. STUART and CHARLES A. MURRAY,
Petitioners and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT AND APPELLEE.

Statement.

The appellants were complainants below. They brought this action in the district court of the State of Colorado for the city and county

of Denver. The purpose of the suit was to quiet complainants' title to a tract of land situate in the city and county of Denver. In addition to the appellee herein the Kansas Pacific Railway Company and the Colorado Eastern Railroad Company were made defendants. The Kansas Pacific Railway Company was never served with process. It is stipulated that prior to the commencement of the action the appellee, Union Pacific Railroad Company, had succeeded to all of the right, title and interest of the Kansas Pacific Railway Company in the tract in controversy (Record, page 117).

In due course the cause was removed into the circuit court of the United States for the district of Colorado, upon the petition of Union Pacific Railroad Company. The appellants moved to remand, but the motion was denied (Record, page 12). No error is assigned upon the denial of this motion. Appellants' bill of complaint set up title in fee simple absolute, deraigned from one Erastus E. Eastman, who, it is alleged, on January 2, 1867, made final entry and purchase from the United States of the land described in the complaint, receiving patent therefor on October 1, 1867. Possession in complainants is alleged, and after the general aver-

ment that the defendants wrongfully claim some right, title or interest in the property, it is prayed that complainants' title may be quieted (Record, pages 2 and 3).

By an amendment to the complaint it is alleged that the said Erastus E. Eastman, under whom complainants claim, did on June 18, 1866, file his declaratory statement under the pre-emption laws, which was followed by final entry and purchase on January 2, 1867, as stated in the original complaint (Record, page 24). Neither the original bill of complaint nor the amendment thereto waived answer under oath. Thereafter the appellee filed its sworn answer to the bill of complaint and the amendment thereto (Record, pages 12 to 20 and page 27). It was stipulated that no objection should be made to the answer because of the fact that it was not under the seal of the corporation, or because of the fact that it was sworn to by the general attorney for the defendant corporation rather than by its president, or some other higher official (Record, page 165). This sworn answer was directly responsive to the averments of the bill, expressly put in issue the allegations of title and of possession in the complainants as to the 400-foot strip of land de-

scribed in the answer, and, in addition, set up specifically title and possession in the appellee and appellee's predecessors in title of all of said 400-foot strip, from a time long prior to the commencement of the suit and up to and including the date of filing the answer.

Appellee by its answer claimed title to said strip of land 400 feet in width, under the Act of Congress approved July 1, 1862, and the acts amendatory thereof and supplemental thereto, known as the Pacific Railroad acts. Such claim was made as the successor in title of the Kansas Pacific Railway Company, originally known as the Leavenworth, Pawnee and Western Railroad Company. The various acts of congress were specifically referred to in said sworn answer, commencing at page 15, folio 26, of the Record.

It is alleged that at the time of the passage and approval of the several acts of congress referred to, the lands in controversy were public lands of the United States. It is alleged that the railroad companies mentioned in said acts of congress complied with all the terms and conditions thereof and constructed the line of railroad contemplated in said acts, which line crossed the lands described in complainants' bill of com-

plaint. It is alleged that the line of railroad so constructed has always been in possession of and operated by the present appellee and its predecessors in title, and that the main track thereof is now and has always remained in exactly the location where it was originally constructed across the lands involved in this controversy, and thereupon appellee claims title to so much of the lands described in the bill of complaint herein as are embraced within a strip 400 feet in width, extending 200 feet on each side of the center of the main track of appellee, as the same crosses the lands described in complainants' bill.

A general replication was filed to this answer, proofs were taken on behalf of both parties, final hearing had and the court below made a general finding in favor of appellee herein upon all issues and dismissed the bill (Record, page 166).

From the decree so entered an appeal was prosecuted by Stuart and Murray to the circuit court of appeals for the Eighth circuit. That court reversed the decree as entered in the lower court and sent the case back with directions to enter a decree recognizing the title of Union Pacific Railroad Company to a strip of land 400 feet in width as granted by the acts of congress

hereinafter discussed, and quieting title to the remainder of the tract in Stuart and Murray.

The opinion was announced by Mr. Justice VAN DEVANTER, then a circuit judge, and is reported in 178 Fed., 753. The opinion was filed on May 2, 1910, and an order entered accordingly. Mandate issued on July 8, 1910 (Record, page 101). Petition for *certiorari* was filed in this Court on September 15, 1910. The petition was granted and the writ allowed and issued on October 18, 1910 (Record, page 192). Pursuant to these proceedings the case is here for review.

FIRST POINT.

It was incumbent upon Appellants to show not only title, but also possession, in themselves. They failed in both particulars.

The suit was brought under section 255 of the Code of Civil Procedure of Colorado (Revised Statutes, 1908, page 125, section 274), which reads as follows:

> "An action may be brought by any person in possession by himself or his tenant of

real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

It has been held in Colorado, under this provision of the statute, that it is not sufficient for a defendant merely to put in issue the plaintiff's claim of title and possession, but defendant must go further and set up an adverse claim in himself. It is also held in Colorado, and such is the general rule, that as soon as an answer has been filed, putting in issue title and possession of the plaintiff, and setting up an adverse claim in the defendant, if such answer be sufficient in form, then the burden at once rests upon the plaintiff to show not only title but possession in himself at the time of the commencement of the suit, before the defendant is called upon to make proof of his title.

Wall vs. Magnes, 17 Colo., 476.
Reynolds vs. Campling, 23 Colo., 105.
Downing vs. Haas, 33 Colo., 344.
17 Ency. Plead. & Prac., page 350.

It will be observed from the statement of facts that appellee not only put in issue, by express denials, the allegations of title and possession in

appellants, but also by specific averments alleged title in itself, antedating that of complainants, and possession under such title of the 400-foot strip which it claimed through the land described in the complaint. The substance of this answer has already been sufficiently stated.

It is asserted that the answer contains no allegation of a compliance by appellee's predecessors in title with the acts of congress set forth. In this counsel are plainly in error. Not only does the answer contain specific allegations of fact showing compliance, but it also contains a general allegation to the effect that all of the railroad companies mentioned—

> " complied with all of the terms and conditions of said several acts of congress, and constructed said line of railroad," etc. (Record, p. 17, fol. 29).

We therefore submit that the answer was sufficient to put complainants to the necessity of sustaining the burden of proof in reference to their title and possession. Not only that, but since the proceeding is one in equity and the answer under oath was not waived by complainants, either in the original bill of complaint or in the amendment thereto, and since the answer

was responsive to the bill, was sworn to and complied with all of the formalities required by equity practice in respect to sworn answers except such as were waived by stipulation (Record, p, 165), it follows that the answer itself was evidence and placed upon the complainants the burden not only of proving their title and possession, by a fair preponderance of evidence, but of proving it by the testimony of two credible witnesses, or the testimony of one such witness, supported by corroborating circumstances, equivalent to the testimony of another.

Slessinger vs. Buckingham, 17 Fed., 454.
Walcott vs. Watson, 53 Fed., 429.
Vigel vs. Hopp, 104 U. S., 441.
Carpenter vs. Providence Ins. Co., 4 How, 218.
Morrison vs. Durr, 122 U. S., 518.
Latta vs. Kilbourn, 150 U. S., 541.

The section of the code under which this proceeding was commenced expressly provides that the action may be brought only by a person in possession by himself or his tenant of the real property involved (Civil Code of Colorado, section 255). The decisions of the appellate courts of Colorado upon this section are uniform to the

effect that when complainant's title and possession are put in issue by an answer, which also sets up an alleged title in the defendant, it is incumbent upon complainants to show by proof both title and actual possession in themselves.

Wall vs. Magnes, 17 Colo., 476, 478.
Walker vs. Pogue, 2 Colo. App., 149, 151.
Vener vs. Denver Union Water Co., 15 Colo. App., 495.
Miller vs. Hall, 14 Colo. App., 367.
Phillipps vs. Leet, 19 Colo., 246.
Chilcott vs. Hart, 23 Colo., 40, at 44.
Reynolds vs. Campling, 23 Colo., 105, 108.

In the case last cited the supreme court of Colorado says:

> "This action having been instituted under section 255 of our Civil Code, it was necessary for the plaintiff to allege and prove her possession at the time this action was begun, this allegation having been put in issue."

The federal courts have without exception ruled that a bill to quiet title or remove a cloud therefrom cannot be maintained unless the complainant both alleges and proves title in himself and possession of the premises at the time of the

action. That is the rule of the federal courts, even when a State statute authorizes a proceeding of that character by a complainant out of possession. But the statutes of Colorado, instead of authorizing such a suit by one out of possession, expressly require that the plaintiff must allege and prove actual possession in himself.

Orton vs. Smith, 18 How., 263, at 265.
Frost vs. Spitley, 121 U. S., 552, at 556.
Whitehead vs. Shattuck, 138 U. S., 146.
Boston, &c., Mining Co. vs. Montana Ore Co., 188 U. S., 632.
Johnston vs. Corson Gold M. Co., 157 Fed., 145.
Kellar vs. Craig, 126 Fed., 630.
Bearden vs. Benner, 120 Fed., 693.
Dewing vs. Woods, 111 Fed., 575.
Morrison vs. Marker, 93 Fed., 692, 695.
Cocke vs. Copenhaver, 126 Fed., 145.
Davidson vs. Calkins, 92 Fed., 230.

In *Orton vs. Smith*, *supra*, the Supreme Court says:

"Those only who have a clear legal and equitable title to land, connected with pos-

session, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

In *Frost vs. Spitley*, *supra*, this Court says (page 556):

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title, and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. * * * A person out of possession cannot maintain such a bill, whether his title is legal or equitable, for if his title is legal his remedy at law by action of ejectment is plain, adequate and complete, and if his title is equitable he must acquire the legal title and then bring ejectment. *United States v. Wilson*, 118 U. S., 86; *Fussel v. Gregg*, 113 U. S., 550."

In *Whitehead vs. Shattuck*, *supra*, the Supreme Court held that the federal court, sitting in Iowa, had no jurisdiction to entertain a bill to quiet title unless complainant both alleged and proved legal title and possession in himself, not-

withstanding a provision of the Code of Iowa which dispenses with such requirement.

From these authorities we are authorized to conclude that both in the courts of Colorado and in the federal courts an unvarying rule prevails which requires complainant in a suit to quiet title to allege and prove both legal title and possession in himself at the time of the commencement of the action. A failure in either particular is fatal to the suit. Complainants in the case at bar failed in both.

Putting aside, for the present, our contention that the legal title upon which they rely was junior and inferior to that of the railroad company, based upon the acts of congress, a brief inspection of the evidence will show that at the time of the commencement of the action complainants had not completed the chain which is claimed to have vested in them the title acquired by Erastus E. Eastman through the original preemption entry and patent. This title, as complainants' chain of title indicates, passed from Eastman to John W. Iliff (complainants' exhibit 3, Record, page 73), in whom it remained until his death, then passing by descent to his heirs at law, in whom it remained until deeded by them to the complainants in the present action. This deed

appears as complainants' exhibit 14, on page 93 of the record, and an examination of the notarial certificates attached thereto discloses the fact that at least one of the parties did not acknowledge the deed until May 31, while this suit was commenced by the filing of a complaint on April 24, 1906. Moreover, the complainants themselves testified that the execution of this deed was not completed, nor was it delivered, until after the commencement of the suit (Record, page 48).

We submit that the legal title certainly was not vested in these complainants at any time prior to the final execution and delivery of said deed. Whatever claims they had in and to said land prior to said date, if any, were equitable in character, but, as has been decided by the Supreme Court of the United States in the cases cited, it is essential that the complainant should possess the legal title in order to maintain a suit to quiet his title. An equitable title or claim will not suffice for that purpose.

Complainants' proof is even more faulty when we reach the question of possession. Bearing in mind that the burden rested on complainants to prove their possession of the lands in controversy

at the time of the commencement of the action, not only by a fair preponderance of evidence, but by such quantum and quality of proof as is required under the federal equity practice, when answer under oath is not waived and such answer is filed, we submit that, beyond any possible doubt, complainants failed in their proof upon this point. The only testimony as to their possession was that of the two complainants themselves. For a correct solution of this question we should bear in mind that the suit was commenced on April 24, 1906, to which date the fact of possession in complainants must refer.

Judge Stuart testifies that "the lands have never been fenced, but have at all times been wild and not under cultivation," but that several surveys thereof have been made by the Adams and Iliff interests (Record, page 35); that the track or tracks of the Kansas Pacific were "surveyed in" with the rest of the land (Record, page 36); that witness had not seen the land for two or three years prior to his testimony; that witness has known lands since about 1887, and that there has always been a track of the Union Pacific Railroad across the same, together with some snow fences (Record, page 40); that between 1887 and two or three years ago witness

saw the land on several occasions when he went out there with parties to whom he was endeavoring to sell the same, and twice when Adams was making some surveys (Record, page 41); that by the term "surveyed in" witness meant that the lines of the survey were run across the railroad track (Record, page 42).

Mr. Murray, the other complainant, testified that he had visited the land a good many times; had never seen any improvements on any part of it or any fencing, unless it would be some barriers against snow-drifts for a short distance along the north side of the railroad track, crossing the southern part of the land; that he was never present at any of the surveys; that in 1892 he was over the land once or twice, and a little later endeavored to lease the land to some dairy men in that vicinity, but did not succeed in doing so. Four or five years before the commencement of the suit he took a gentleman from Iowa and drove over the land at different points, with a view of inducing the Iowa gentleman to purchase a part or all of the property, and spent a good portion of the day in driving over and examining it (Record, page 49). Since that time he took a man and his wife in an automobile to the land with a view to exchanging it for prop-

erty near Greeley, but did not succeed in making a deal. At other times between 1892 and the time of the beginning of the suit he has taken other parties out to see the land (Record, page 49); that from 1892 up to the commencement of the suit he averaged about one visit per year, and that on those occasions he would go out and return the same day, never staying there over night (Record, page 54); that not more than six months had elapsed between his last visit to the land and the commencement of the suit, and that he was not on the land at the time of the commencement of the suit (Record, page 55).

This is all of the testimony on behalf of complainants in respect to the matter of possession. It shows, so far as complainants are concerned, that the land was unfenced, unimproved and unoccupied at all times up to and including the date of the commencement of the action. We submit that in the absence of any evidence on behalf of the railroad company the evidence offered on behalf of complainants was wholly insufficient to sustain the burden resting upon them in this particular, or to evercome the evidence of the sworn answer denying possession in complainants, and averring possession in the

defendant. But when we examine the evidence on behalf of the defendant it clearly appears, in respect to the 400-foot strip which is claimed by appellee, not only that this strip was not at the time of the commencement of the suit, and never had been, in the possession of complainants, but that said strip at the time of the commencement of the suit was, and ever since the original construction of the railroad had been, in the actual possession of the defendant railroad company and its predecessors in title.

The line of railroad at this point was built in the year 1870 and has ever since been operated continuously by appellee and the railroad companies which were its predecessors in title.

Col. Eicholtz, the engineer having charge of the original construction, testified that the line was now in the same position across these subdivisions as when first constructed by him (Record, page 128).

Edwin Scrafford, a locomotive engineer, had run his engines over this line, commencing with 1870, and testified that the line had been continuously operated, and that the track was in the same position as when he first went over it (Record, page 118).

Patrick J. McGill, another locomotive engineer, testified to the same effect, his testimony covering a period commencing with the year 1871 (Record, page 120).

A. F. Vick Roy, superintendent of the defendant railroad company, testified concerning this track, his testimony covering a period commencing with the year 1871, and was to the effect that the track had always been in the same location across these subdivisions, and always has been continuously operated as a railroad by Union Pacific Railroad Company and its predecessors in title, and that the usual railroad operations had been had thereover, and the usual railroad improvements constructed and maintained thereon (Record, page 106).

Defendant's exhibit "A," a large blue-print of the line of railroad across these subdivisions, showed not only the railroad, but show fences, a post and wire fence, telegraph poles and other improvements such as are ordinarily erected by a railroad in full operation, and defendant's witnesses testified that these improvements existed upon the ground at and for a long time prior to the commencement of the action.

For the convenience of the court, a copy of

said exhibit "A," upon a reduced scale, is appended at the end of this brief.

We submit that this evidence showed actual possession in the railroad company, not only of the space occupied by the track itself, but of the entire strip 400 feet in width.

The acts of congress granting to the predecessors in title of defendant a strip of land of this width were matters of public record, and the law presumes that the appellants were familiar therewith and with the construction which the courts had put upon the same. These constituted the color of title under which the railroad was in possession, and the rule is well settled that possession of part of a tract, under color of title to the whole, amounts to actual possession of the entire tract.

The complainants have never had any actual possession whatsoever. If they attempt to rely upon constructive possession a conclusive answer to such contention would be that there can be no constructive possession when the actual possession is in another, as in this case it was in Union Pacific Railroad Company. But even if complainants had been in actual possession of some portion of the land which they claim, and should now contend that by virtue of such possession of

a part they were maintaining possession of the entire tract described in their color of title, the answer would be two-fold: (1) That they had no color of title, because up to the commencement of the suit, as we have heretofore shown, they had not acquired the legal title flowing from the entry and patent of Eastman; (2) that treating Eastman's patent as color of title, possession by complainants thereunder of a part of the land therein described could not give them possession, actual or constructive, of that portion of the subdivisions in conflict with the grant made by act of congress to the railroad companies of a 400-foot strip, for the reason that as to said conflict or interlock the railroad company was in actual possession and claiming under a senior title.

1 Cyc., 1132.
White vs. Bates, 7 J. J. Marsh (Ky.), 538.
McCormick vs. Munroe, 48 N. C., 332.
Williams vs. Miller, 29 N. C., 186.
Borrets vs. Turner, 3 N. C., 273.

The possession of the whole width of the right of way is implied from the operation of a railroad through the center of it; and that rule is clearly

stated in *Southern Pacific Co. vs. Hyatt*, 132 Cal., 240, from which we quote as follows:

> "Jones on Easements lays down the rule that the prescriptive right to a passage way along the track or right of way of a railroad cannot be acquired by the public or by individuals, while the railroad is constantly using a single track over such right of way. *The construction and operation of one track on its location is an assertion of right to the entire width of its right of way.* The presence of one track constantly in use is a definite badge of ownership and the only practical assertion of title that can be made. If the public has used the paths by the side of the railroad track for any length of time, the use must be considered as permissive and not adverse; citing a long list of authorities from different states. Jones, Easements, page 232, sections 2 and 81. Individuals may enter upon or obstruct the public thoroughfare, but cannot acquire title by prescription to such lands."

In *Pennsylvania Co. vs. Freeport*, 138 Pa. St., 91, it is said that—

> "mere non-user by the railroad company of the entire width of the right of way does not cause such unused part to revert to the

public, even though the public is allowed by the company to use it as a thoroughfare."

And in the court's opinion it is said:

"Hence it would be unreasonable to hold that the mere non-user of a part of a railroad location, side by side with the part in actual continuous use, . . . would [cause it to] revert to the public simply because the public had enjoyed a permissive, not a hostile, use of this contiguous ground. We think the construction of a track or tracks upon a part of the location throughout its length is the best assertion of right to the entire width that could, in the nature of railroad construction and operation, be demanded. . . . The presence of the railroad tracks constantly in use is the defiant badge of ownership. It is the only practical assertion of title that can be made. The rule does not differ, because the location of a railroad is through a more populous district, in this case through a borough, whose citizens have availed themselves of the convenience of using the ground along the railroad track notwithstanding the railroad ties and rails of the company may not have spanned and bound literally with an iron grasp from one side to the order, its authorized domain."

As a matter of fact as well as of law, the railroad company has always been in possession of the entire right of way. The courts say it is incapable of losing possession.

In *Kindred vs. Union Pacific R. Co.*, 168 Fed., 648, at page 653, it is said, with reference to the acts of congress here under consideration:

> "It was conclusively determined by the act of congress that a right of way of 400 feet in width was essential to the performance of the duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of congress, nor lost by laches or acquiescence. *Northern Pacific v. Smith*, 171 U. S., 260; *Northern Pacific v. Townsend*, 190 U. S., 267; *Northern Pacific v. Ely*, 197 U. S., 1. It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time. Possession of portions thereof by individuals was not adverse, in the sense that it might ripen into title; nor, however long it was permitted to continue, did it preclude the railroad company from performing its duty by asserting its right thereto whenever the necessity for the full use arose. That for a long time it maintained its right of way

fences within the exterior limits of the strip gave the adjacent landowners nothing more than a permissive use of the uninclosed portions * * *"

The decision of the circuit court of appeals in the *Kindred case* was recently affirmed by the Supreme Court.

Kindred vs. Union Pacific R. Co., 225 U. S., 582.

Since the entire width was essential for the purposes of the grant, and since the railroad company was in possession and operating a railroad pursuant to the grant, and performing the duties which required, as congress had conclusively determined, the entire width of 400 feet, how can it possibly be said that it was not in possession of the entire 400 feet? The fact that its right of way fences had not been placed upon the outer limits of the strip is of no significance. Even if the enclosed portions had been shown to be in the actual possession of complainants, yet such possession would have been permissive—in reality the possession of the railroad company itself—and not adverse. It is so held in the *Kindred case* just cited.

Upon the considerations advanced and the

authorities cited in the foregoing pages, we submit that complainants failed in their proof, both in respect to the matter of legal title and in respect to the matter of possession. Their remedy against the defendant, if they are entitled to any, lies in an action at law for the recovery of possession. Equity has no jurisdiction. And since the Union Pacific Railroad Company, appellee here, was the sole defendant to the bill in the federal court, and since, against that defendant, complainants were entitled to no relief, the court below committed no error in dismissing the bill and entering judgment accordingly.

But it is asserted by appellants (page 40 of their brief) that the matter is entirely and conclusively disposed of by the opinion of the circuit court of appeals, and may not now be considered. The effect of the decision of the circuit court of appeals was to require a dismissal of the suit as to the 400-foot strip claimed by appellee. If this decision was right upon any ground presented by the record and brought to the attention of the trial court and the circuit court of appeals, it should be affirmed. If it be true that the circuit court of appeals reached the right conclusion, but assigned the wrong reason therefor, such decision will not be reversed, for

the appellant could not in any event be prejudiced thereby. The matter was presented fully both to the circuit court and to the circuit court of appeals, as is evident from the pleadings and testimony in the record and from the opinion of the last-named court. It is clearly open for consideration by this Court.

Silsby vs. Foote, 14 How., 218–222.

Sullivan vs. Iron Silver Min. Co., 143 U. S., 431–434.

Pennsylvania Rd. Co. vs. Wabash, &c., Ry. Co., 157 U. S., 225–229.

Grimes Dry Goods Co. vs. Malcolm, 164 U. S., 483–492.

Peck vs. Heurich, 167 U. S., 624.

Evans vs. Suess Co., 83 Fed., 706; *certiorari* denied, 171 U. S., 687.

Moffatt vs. Smith, 101 Fed., 771.

Whitney vs. N. Y., &c., Co., 102 Fed., 850.

Currier vs. Trustees, 117 Fed., 44.

American Tube Works vs. Bridgewater Co., 132 Fed., 16.

Latting vs. Owasso Co., 148 Fed., 369.

McCloskey vs. Pacific Coast Co., 160 Fed., 794.

Joslyn vs. Cadillac Co., 177 Fed., 863.

Appellants also assert (page 79 of their brief) that the rules applicable to a suit in equity in the federal courts do not govern here, because this suit originated in a State court and came into the federal court by removal. The authorities cited by appellants do not sustain the contention, and, of course, the rule is otherwise. The act of congress regulating the removal of causes provides that after the record has been filed in the circuit court of the United States—

> " the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court " (U. S. Compiled Statutes 1901, vol. I., p. 510, sec. 3).

Where a party has removed a cause into the circuit court he has a right to have its further progress governed by the law of that court, and not by that of the court from which it was removed.

Ex Parte Fisk, 113 U. S., 713–726.
King vs. Worthington, 104 U. S., 44.
Hewitt vs. Phelps, 105 U. S., 393–397.
Northern Pacific R. Co. vs. Paine, 119 U. S., 561–564.
Hurt vs. Hollingsworth, 100 U. S., 100.

Coosaw Min. Co. vs. South Carolina, 144 U. S., 550–564.

Thompson vs. Railroad Companies, 6 Wall., 134–138.

None of the authorities cited by appellants in this connection in any manner affects the settled rules prevailing in the federal courts that a complainant may not maintain a bill to quiet title without both alleging and proving legal title and possession in himself. It is true that the federal courts have held that when a State statute authorizes the maintenance of a bill to quiet title by a party out of possession, the federal court will permit such a bill to be maintained, but only when the defendant is also out of possession, and not when he is in possession, although the law of the State permitted it even in such a case.

U. S. Min. Co. vs. Lawson, 134 Fed., 769.

Lawson vs. U. S. Min. Co., 207 U. S., 1.

Boston, &c., Co. vs. Montana, &c., Co., 188 U. S., 632.

In the case last cited the Supreme Court says:

"It is also objected that as a bill of peace or to quiet title, it is defective because there

is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession an action in ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title, cannot prevail in a federal court, unless it be alleged and proved that both parties are out of possession. *Whitehead vs. Shattuck*, 138 U. S., 146."

But there is no statute in Colorado which authorizes such a suit by one out of possession. On the contrary, the statute and the Colorado cases which construe it expressly require such possession on the part of the plaintiff. Complainants below, appellants here, averred and relied upon legal title in themselves, and likewise averred and relied upon actual possession in themselves. The proofs fail to sustain either averment. Necessarily, the suit could not be maintained as against appellee, respondent below, and therefore the decision of the lower court was right and should be affirmed. As was said in *Frost vs. Spitley*, 121 U. S., 552:

"A person out of possession cannot maintain such a bill, whether his title is legal or equitable, for if his title is legal his remedy

at law by action of ejectment is plain, adequate and complete, and if his title is equitable he must acquire the legal title and then bring ejectment."

SECOND POINT.

The acts of congress applicable and compliance therewith by the Railroad Company, grantee.

The case presented is one of conflicting grants. The appellant claims under a patent from the United States, purporting to convey the lands described in the bill of complaint, without any exception or reservation of railroad right of way. The appellee claims, under certain acts of congress, granting to its predecessor in title a strip of land for right of way purposes, 400 feet in width, being 200 feet on each side of the center of the main line of its railroad which crosses the lands described in appellants' patent. It is necessary to determine which is the prior grant, and therefore the better title.

By its pleadings and by its proof appellee rested its claim to a strip of land 400 feet in width through the premises in controversy upon certain acts of congress, acceptance thereof by its

predecessor in title and construction of the railroad contemplated thereby through the lands described in the complaint.

The act of July 1, 1862 (12 Statutes at Large, 489), provided for the formation of a corporation named "The Union Pacific Railroad Company," and authorized it to construct a line of railroad and telegraph from a point on the 100th meridian of longitude between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river in the territory of Nebraska, to the western boundary of Nevada territory. The act was entitled,

> "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes."

By section 2 of the act it was provided:

> "That the right of way through the public lands be and the same is hereby granted to said company for the construction of said railroad and telegraph line. * * * Said right of way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass over the public lands."

By section 3 of the act there was granted to said railroad company

> "* * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed; provided, that all mineral lands shall be excepted from the operation of this act."

By section 7 of the act it was provided that within two years after the passage of the act the

> "* * * company shall designate the general route of said road as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale; and when any portion of said route shall be finally located, the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named."

By section 8 of the act it was provided that the line of said railroad should commence at a point on the 100th meridian of longitude between the valleys of the Republican and Platte rivers in Nebraska, at a point to be fixed by the President of the United States; thence running westerly

> "upon the most direct, central and practicable route through the territories of the United States to the western boundary of the territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California."

By section 9 the Leavenworth, Pawnee & Western Railroad Company of Kansas was authorized to construct a railroad and telegraph line from the Missouri river at the mouth of the Kansas river on the south side thereof, so as to connect with the Pacific Railroad of Missouri at the aforesaid point on the 100th meridian of longtitude

> "upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned."

And by the same section it was further provided that each of said companies should file

their acceptance of said act in the Department of the Interior within six months after the passage of the act. Within the time provided by section 9 of the act the Leavenworth, Pawnee and Western filed its acceptance of the same (Exhibit "C," Record, page 150).

The act of July 2, 1864 (13 Statutes at Large, 356), was entitled, "An act to amend" said act of July 1, 1862. This act removed certain restrictions upon the bond aid provided by the original act, doubled the grant of odd-numbered sections, and by section 9 provided that—

> "* * * any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act."

The Leavenworth, Pawnee and Western Railroad Company, at that time known as the Union Pacific Railroad Company, Eastern Division, likewise accepted the provisions of the act of 1864 (Exhibit "E," Record, page 154).

By the act of congress, approved May 7, 1866 (14 Statutes at Large, 355), the time for the completion of construction upon the line of the Leavenworth, Pawnee and Western was enlarged.

By an act approved July 3, 1866, and entitled "An act to amend" said amendatory act of 1864 (14 Statutes at Large, page 79), the time for the filing of the map of general route of the Union Pacific Railway Company, Eastern Division, was extended to December 1, 1866. It was provided that upon the filing thereof lands along the entire line should be reserved from sale; and it was further provided—

> "that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

This act also was accepted by the railroad company in due time, and the map of its general route from the western boundary of Kansas (to

which point a map of general route had previously been filed) west to the city of Denver, and from Denver to a connection with the Union Pacific main line at a point less than fifty miles west of the Denver meridian was filed within the period required by the act. This map was approved and the withdrawal of lands ordered (Exhibit "H," Record, page 156).

By act of congress, approved March 3, 1869, the name of The Union Pacific Railway Company, Eastern Division, previously known as The Leavenworth, Pawnee and Western Railroad Company, was changed to The Kansas Pacific Railway Company (15 Statutes at Large, page 348).

The line of railroad which the Kansas Pacific, previously known as the Union Pacific, Eastern Division, and before that as the Leavenworth, Pawnee and Western, was authorized by these acts of congress to build, was actually constructed within the time provided by the several acts, and its main line crossed the lands now claimed by the appellants. The line was built over these lands about 1870, has ever since remained in the same location in which it was originally constructed, and has been continuously operated by appellee and its predecessors

in title for railroad purposes. This is the testimony of Colonel Eicholtz, who had charge of the original construction of the line (Record, page 128); of Edwin Scrafford, an engineer who has run his engines over this track since 1870 (Record, page 118) of Patrick J. McGill, another engineer who has run his engines over this track since 1871 (Record, page 120), and of A. F. Vick Roy, superintendent of appellee, who has been in the employ of the Union Pacific and its predecessors in title for many years, and has known this portion of the track since 1871 (Record, page 106).

The fact that the railroad track over these lands was built by the company mentioned under various names in said acts of congress; that it is a part of the line which those acts contemplated should be constructed from the Missouri river at the mouth of the Kansas river to a connection with the main line; that it was originally built across the lands in controversy, and is now and has always remained and been operated in the same location where it was originally placed, are points not controverted by the appellants. (Record. pages 46, 47.)

The blue-print introduced by appellee (exhibit "A"), and properly identified by the

engineer who prepared the same (Record, pages 97, 98), correctly shows the location of this tract across the subdivisions described in the bill of complaint, and has been certified to this Court to be exhibited at the oral argument.

On October 4, 1872, the commissioners appointed by the President of the United States, pursuant to the acts of congress, mentioned above, to examine and report upon that portion of the line of the Kansas Pacific, extending from Denver easterly for a distance of about 150 miles, and crossing the lands described in the bill of complaint here, reported that the same had been completed as required by law; and on October 18th of the same year the Secretary of the Interior recommended the acceptance of such report. On October 19th of the same year President Grant approved said recommendation and report, and instructed the Secretary of the Interior to carry the same into effect. (Exhibit "K," Record, page 157).

As further evidence of the approval and acceptance of the line by the United States, the Register of the United States Land Office at Denver testified that the odd-numbered sections lying on either side of that portion of the railroad which crossed the lands here in controversy,

had, for a distance of 20 miles each way, been patented to the Kansas Pacific Railway Company and its successors in title, pursuant to said acts of congress (Record, pages 133 to 138).

It is stipulated that appellee was at the time of the commencement of the action and prior thereto the owner of all property, right of way and railroad track of the Kansas Pacific, previously known as Union Pacific, Eastern Division, and before that as the Leavenworth, Pawnee and Western, and held by said Kansas Pacific by virtue of any and all of the acts of congress specified in the answer (Record, page 117).

We submit that the proofs introduced by the appellee, including the facts conceded and stipulated by the appellants, show perfect title in appellee to a strip of land 400 feet in width, being 200 feet on each side of the centre of appellee's track crossing the lands in question, which title had its origin before the title originated under which appellants claim the entire subdivisions described in the complaint; and since the title of the railroad company is prior in point of time, it is superior and paramount, so far as the 400-foot strip is concerned, to that relied upon by the appellants.

THIRD POINT.

Construction and effect of these acts of Congress.

1. Rules of Construction.

As already noted, the act of 1864 is expressly amendatory of the act of 1862, and the act of 1866 is expressly amendatory of both of the previous acts. The rule is well settled that in such a case the acts are to be read together as constituting one statute which may be deemed to have been passed with the amendments incorporated therein at the date of the last amendment.

In *Blair vs. Chicago*, 201 U. S., 400, at 475, this Court said:

> "The rule was thus stated in *Farrell v. State*, 54 N. J. Law, 421: 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended'. *People v. Circuit Judge*, 37 Michigan, 287. In *Conrad v. Nall*, 24 Michigan, 275, a section in the chapter of the code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole

chapter in its present form must be read as one act. The rule is correctly stated in *Endlich on Statutes*, section 294, as follows: 'A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.' "

In *Black on Interpretation of Laws*, page 351, substantially the same statement is made, and the author adds:

"And where an amendatory act uses the language 'under the limitations herein provided,' this must be taken to refer to the limitations in the original act as it stands after all the amendments made thereto are introduced into their proper places therein."

See also

Endlich on Interpretation of Statutes, sec. 294.

26 A. & E. Ency. (2d Ed.), page 712.

U. S. vs. Freeman, 3 How, 548.

Alexander vs. Mayor, 5 Cranch., 1.

Applying this well-settled rule, the statute as it stood after enactment of 1864 was as follows:

A main line was authorized to be constructed from the initial point on the 100th meridian westwardly to the western boundary of Nevada territory.

By section 2 a right of way over the public lands 400 feet in width was granted.

By section 3 the odd-numbered sections, to the extent of ten per mile within the limits of twenty miles on each side of the road, were granted, excepting, however, those to which a pre-emption or homestead claim had attached at the time the line of said road was definitely fixed.

By section 5 the bond aid to the amount of $16,000 per mile was granted.

And by section 9 the Kansas line, originally known as the Leavenworth, Pawnee and Western and afterwards as Union Pacific Railway Company, Eastern Division, was authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, so as to connect with the main line,

> "at any point westwardly of such initial point" [the 100th meridian] and "upon the same terms and conditions in all respects as are provided in this act for the construc-

tion of the railroad and telegraph line first mentioned";

and by amendment of 1866 said Kansas company was authorized to designate the general route of its road and file a map thereof prior to December 1, 1866, whereupon the odd-numbered sections along the entire line thereof were to be reserved from sale; but said company was to have no bond aid for that part of the line west of what would have been the line, if connection had been made at the 100th meridian, and by the limitation of 1866 said connection was required to be made with the Union Pacific Railroad at a point not more than fifty miles westwardly from the meridian of Denver. And by the resolution of May 7, 1866, the Kansas company had until June 27, 1872, at the earliest, within which to definitely locate and construct its line of road. Such an enactment requires no construction; its meaning is obvious. In such a case construction and interpretation have no place.

It will be observed that liberal aid is given by the United States for the construction of this railroad and all of its branch lines. This aid consisted of the right of way 400 feet in width granted by section 2, the odd-numbered sections

to the extent of ten per mile on each side of the line granted by section 3, and the United States bonds granted by section 5.

By the express terms of the act of 1864 the bond aid was not granted for any portion of the Kansas line west of the meridian of Fort Riley. But *expressio unius est exclusio alterius.* If congress had intended to withhold the grant of right of way for that portion of the line, it is plain that it would have said so, as it did in respect to the bonds.

> " It was the intention of congress, both in the original and in the amendatory act to place the Union Pacific company and all its branch companies upon the same footing as to land, privileges, and duties to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the government."
>
> *U. S. vs. Burlington, &c., Rd. Co.*, 98 U. S., 334, at 341.

> " From a careful examination of the statutes relating to this subject, we are of opinion that whilst, as to its entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions

and restrictions of the act;' and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only."

U. S. vs. Kansas Pacific R. Co., 99 U. S., 455, at 458.

See, also,

Kansas Pacific R. Co. vs. A. T. & S. F. R. Co., 112 U. S., 414, at 418.

U. S. vs. Union Pac. Ry. Co., 160 U. S., 1, 19, 20, 21, 26, 27, 28.

It is to be remembered that these statutes are not merely grants or contracts, but laws of the United States. They are, therefore, to be construed liberally, for the purpose of carrying out the intent of the congress, when ascertained, rather than strictly against the grantee and in favor of the grantor, as might be true in the case of an ordinary grant.

In *St. Paul &c., Rd. Co. vs. Greenhalgh*, 26 Fed., 563, Mr. Justice BREWER said:

"All legislative land grants are to be regarded not merely as contracts, but also as laws. As such they are subject to the same

rules of interpretation that govern other laws, and the primary rule is that the intent of the legislator is to be sought, and, when ascertained, controls. The technical rules which govern the interpretation of private contracts must always yield to the single inquiry of the intent, of the one party—the legislature."

In *Winona & St. P. Rd. Co. vs. Barney*, 113 U. S., 618, at 625, this Court, speaking with respect to such statutes, said:

"They are to receive such construction as will carry out the intent of the congress, however difficult it might be to give full effect to the language used—if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

See, also,

U. S. vs. D. & R. G. R. Co., 150 U. S., 1, at 14.

M. K. & T. Ry. Co. vs. Kansas Pac. R. Co., 97 U. S., 491, at 497.

U. S. vs. Southern Pac. R. Co., 146 U. S., 570, 593, 594, 598.

As to what was the intent of congress in making such liberal grants to the predecessors in title of the appellee, including the grant of right of way, it is proper to inquire what were the conditions existing at the time and what was the aim and purpose of congress in enacting the statutes. This was fully expressed in *U. S. vs. Union Pac. Rd. Co.*, 91 U. S., 72.

See, also, *U. S. vs. Union Pacific*, 160 U. S., 1, 19, 20, 21, 26, 27, 28.

In order to correctly apply these acts of congress it is therefore necessary that we should examine and consider them from the point of view of those who enacted them and with full understanding of the circumstances under which —and the great public purposes for which—they were enacted.

2. THE GRANTS OF LAND AND RIGHT OF WAY MADE BY THE ACTS.

It will be observed that section 2, making the grant of the right of way, and section 3, making the grant of the odd-numbered sections, are both framed in words of present grant—" that there be and is hereby granted."

Clearly, neither the location of the right of

way nor the identity of the odd-numbered sections granted could be known until the line of the road was definitely and finally located. The route prescribed, both for the main line and for each of the branch lines, was quite indefinite. For instance, the route of the main line as described in the act was to commence at a point on the 100th meridian and thence running westerly " upon the most direct, central and practicable route " to the western boundary of the territory of the Territory of Nevada, there to connect with the Central Pacific wherever the road might choose to cross said western boundary (Section 8, act of 1862; *Dillon's Paciific Ralroad Laws*, p. 16). So far as the language of the act goes, this point of connection might have been anywhere upon a north and south line over 700 miles in length.

The same indefiniteness exists in the acts of congress in reference to the line of the Central Pacific (act of 1862, section 9; Pacific Railroad Laws, p. 17); the Hannibal and St. Joe (act of 1862, section 13; Pacific Railroad Laws, p. 20); the other branch lines authorized by the act of 1862 (section 14, Pacific Railroad Laws, p. 21); the Sioux City branch (act of 1864, section 17, Pacific Railroad Laws, p. 40); the line of the

Northern Pacific, described in the act of congress is as follows :

> "Beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound" (Act of July 2, 1864, section 1; 13 Stat., 365, Pacific Railroad Laws, page 47).

All of these lines, as described in the acts of congress, were more indefinite than the line of the Kansas branch, as described by the act of 1864. Yet notwithstanding the uncertainty as to the route, under the language of the several acts of congress, it has always been held from the beginning that the grant was in *praesenti* and took effect from the date of the act, although in one case the exact location of the right of way and in the other the exact identification of the odd-numbered sections granted could not be determined until the line of the road was definitely fixed.

It will be noted that the grant of the odd-numbered sections in the act here under consideration excepted from its operation certain odd-

numbered sections, to-wit: those which had been sold or to which pre-emption or homestead rights had attached prior to the definite location of the road. It will also be noted that section 2 of the act granting the right of way contained no exceptions or reservations whatever. In respect of the grant of odd-numbered sections it has always been held from the beginning that these acts of congress granted the same, as of the date of the act, and that when the sections were identified by the final and definite location of the railroad all intervening claims yielded, except as to those sections mentioned above, specifically reserved or excepted from the grant by the act of congress. Several of the following decisions relate to the precise grant here under consideration:

M. K. & T. Ry. Co. vs. Kansas Pac. Ry. Co., 97 U. S., 491, 496.

U. S. vs. Burlington, &c., Rd. Co., 98 U. S., 334.

Van Wyck vs. Knevals, 106 U. S., 360, at 365.

Kansas Pac. R. Co. vs. A. T. & S. F. R. Co., 112 U. S., 416, 417, 417, 418.

Kansas Pac. R. Co. vs. Dunmeyer, 113 U S., 629, 633.

St. Paul & Pac. R. Co. vs. Northern Pac. R. Co., 139 U. S., 1, 5.
U. S. vs. Southern Pac., 146 U. S., 570, 593.

In *M. K. & T. Ry. Co. vs. Kansas Pacific supra*, the same statute was under consideration as is here involved, and the case related to lands west of Fort Riley and along the line of general route shown by the map of general route filed after the act of 1866, extending to the western line of the State of Kansas, by way of the Smoky Hill river, instead of the Republican river. Thence through Denver to Cheyenne, Wyoming, being the route upon which the line of railroad here involved was constructed.

The foregoing decisions relate to the provisions of section 3 of the act of 1862, as amended in 1864, granting the odd-numbered sections.

Section 2 of the same act granted the right of way in the same terms of present grant as was used in section 3 with reference to the odd-numbered sections, but the grant of the right of way, unlike the grant of the odd-numbered sections, contained no exceptions or reservations whatsoever. Therefore, it has from the beginning received the uniform construction that it granted the right of way as of the date of the act of con-

gress over all lands then subject to the disposal of congress, and when identified by the definite or final location of the railroad, all rights or claims which had attached to the lands between the date of the act of congress and the date of the final and definite location necessarily yielded and were subject to the paramount and prior grant.

Railroad Co. vs. Baldwin, 103 U. S., 426.

Bybee vs. Oregon & Cal. Ry., 26 Fed., 586, 588, 589.

Bybee vs. Ore. & Cal. Ry., 139 U. S., 663, 674–679.

Smith vs. Northern Pac. R. Co. (C. C. A., 8th Cir.), 58 Fed., 513–515.

Northern Pacific R. Co. vs. Smith, 171 U. S., 260, at 267.

Northern Pac. R. Co. vs. Ely, 197 U. S., 1, 5.

Northern Pac. R. Co. vs. Hasse, 197 U. S., 9, 10.

Union Pac. R. Co. vs. Harris, 215 U. S., 386, 389.

Kindred vs. Union Pac. R. Co. (C. C. A., 8th Cir.), 168 Fed., 652; affirmed 225 U. S., 582.

Union Pac. R. Co. vs. Karges, 169 Fed., 459.

In *Railroad Co. vs. Baldwin*, *supra*, the Supreme Court was construing a similar act of congress, wherein the line of road as described in the act of congress was just as indefinite as the line of the Kansas branch of the Union Pacific, as described in the act of 1864. After noting the previous decisions of the court with reference to the grant of odd-numbered sections and the reservations and exceptions therein contained, the Supreme Court, speaking through Mr. Justice FIELD, says (page 429):

> "But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by the road running through them. On the contrary, their value would be greatly enhanced thereby.
>
> "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company

could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the

act in question, took the same subject to the right of way conferred by it for the proposed road."

In *Smith vs. Northern Pacific*, *supra*, this doctrine was applied to the Northern Pacific act passed on the same day as was the Union Pacific act of 1864, containing the same language, and therefore, as must be conclusively presumed, evidencing the same policy of congress.

The same doctrine was applied to the grant of right of way made by the Northern Pacific act in *Northern Pacific vs. Ely*, *supra*, wherein the Supreme Court says (pages 4, 5):

> " It may be added that it was only as to some of the parcels that the final map of definite location and the construction of the railroad preceded the filing of the entries, but we regard the case as falling within the rule holding the grant of the right of way effective from the date of the act " (*Railroad Company vs. Baldwin*, 103 U. S., 426).

And the same ruling was made in *Northern Pacific vs. Hasse*, *supra*, the Supreme Court saying (page 10):

> " The grant of right of way, unlike the land grant, was effective from the date of the act; and the fact that the railroad was

not built until after defendants' entry does not affect the disposition of the case." (*Railroad Co. v. Baldwin, supra; Bybee v. Oregon & Cal. Rd. Co., supra.*)

In *Kindred vs. Union Pacific* (168 Fed., 648), the same doctrine was applied to the grant of right of way under the Union Pacific acts, for the very same branch line here under consideration, the circuit court of appeals, speaking through Judge HOOK, saying (page 652):

> " The grant of the right of way in section 2, adopted for the Leavenworth, Pawnee & Western Railroad Company by section 9, applied to all public lands in respect of which congress could so legislate. * * * The exceptions and reservations found in section 3 of the act related to the donation of lands in aid of the construction of the railroad, and doubtless included the Indian reservations like that of the Delawares. They are the customary exceptions and reservations in such cases; but it is apparent that they have no relation to the right of way granted by the second section. The application of them exclusively to the land grant indicates the intention of congress to give a right of way across all lands, without exception, so far as it was within its power to do so."

3. THE ACT OF 1864 AUTHORIZED THE LINE OF RAILROAD WHICH WAS CONSTRUCTED ACROSS APPELLANT'S LAND, AND THEREFORE GRANTED THE RIGHT OF WAY.

In *Missouri, Kansas and Texas Ry. Co. vs. Kansas Pacific Ry. Co.*, 97 U. S., 491, 494, it was held that the amendatory act of 1864

> " authorized the plaintiff [the predecessor of the appellee and respondent here] to construct its road and telegraph line so as to connect with the Union Pacific road at a point west of its initial point [the 100th meridian] in case it deemed such westward connection more practicable or desirable ";

and in *United States vs. Kansas Pacific Ry. Co.*, 99 U. S., 455, 457, it was held :

> " The authority of the company to extend its road west of the one hundredth meridian was derived from the ninth section of the act of 1864, which declared as follows: [Quoting what is hereinbefore set forth.] It thus appears that whilst the company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and, if it did, it was not to expect, or have, any subsidy of government bonds for such

extension. It is found by the court that the company actually extended its road westward as far as Denver, 245 miles west of the one hundredth meridian, but did not complete the same to that point, so as to be accepted by the president, until the 19th of October, 1872. * * * From a careful examination of the statutes relating to the subject, we are of opinion that, *whilst, as to the entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act'* [italics are ours], and is bound to furnish transportation and telegraph accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the 5 per cent. of the net earnings is only demandable on the net earnings of said portion."

Both the language of the acts of congress and the decisions of the courts make the conclusion imperative that the act of 1864 authorized the construction of the line of railroad afterwards built by the Kansas Pacific. It follows that said act also made the grant of the right

of way requisite therefor, because the line was to be built "upon the same terms and conditions" as the main line, which means that every benefit was conferred upon said branch line as was given to the main line, unless the act otherwise expressly stated.

It is asserted by the petitioners and appellants that the act of 1864 granted neither a right of way nor odd-numbered sections. They contend that both of these were conferred, if at all, by the act of 1869 (15 Stat., 324, Pacific Railroad Laws, p. 87); but the circuit court, speaking through Mr. Justice BREWER, and this Court in affirming his decision, have definitely decided that the grant was made for the branch line in question, not by the act of 1869, but by a prior act.

U. S. vs. Union Pacific R. Co., 37 Fed., 551.

U. S. vs. Union Pacific R. Co., 148 U. S., 562, 569.

The executive departments, the courts, and congress itself, have from the beginning understood the acts to mean that the branch line in question was authorized by the act of 1864, and that the act of 1866 in no manner changed the situation in that regard.

On February 21, 1866, the Union Pacific Rail-

road Company, Eastern Division, by John D. Perry, its president, presented to the Department of the Interio[illegible] map of its route west from Fort Riley, by way of the Smoky Hill river (the route afterward built upon), and requested that the same be accepted and lands withdrawn accordingly, pursuant to the act of 1864. The Secretary of the Interior referred the matter to the Attorney General for his opinion. This opinion was delivered on April 16, 1866, and is reported in volume 11, Opinions of Attorney General, at page 462, under the title, "*Claims of Union Pacific Railroad Company.*" The headnote is as follows:

> "The Union Pacific Railroad Company, Eastern Division, cannot, after the expiration of three years from the date of the act of July 1, 1862, abandon the original route from Fort Riley to the one-hundredth meridian and claim the withdrawal from preemption, entry and sale of lands within fifteen miles of a proposed new route, designated on a map filed in the department of the interior."

In the course of the opinion the Attorney General said:

> "Now, on reading these statutes [the acts of 1862 and 1864], with the view of determin-

ing the question before us, we must treat the seventh section of the act of 1862, amended by the fifth section of the act of 1864, as if it had originally provided that the company should, within three years after the passage of the act of 1862, designate the general route of its road and file a map of the same in the department of the interior. *And we must further read the ninth section of the act of 1862, amended by the ninth section of the act of 1864, just cited, as if it had enacted that the company in question might construct a railroad from the mouth of the Kansas River to the initial point of the Union Pacific Railroad on the one-hundredth meridian, or construct its road so as to connect with that railroad at any point westwardly of its initial point.* That was the option, it would seem, intended to be conferred by Congress upon the present company. * * * The company did not, until February 21, 1866, present to the department a map of the new route west from Fort Riley, by the Smoky Hill. * * * If it had a right to change the general route designated by the Leavenworth, Pawnee and Western Railroad Company, that right, in view of the statute, was not exercisable after the expiration of three years from July 1, 1862. It might well be

contended that the fifth section of the act of 1864, extending the time for filing the map to one year; and the ninth section of the same act, enabling any company authorized to construct its road from the Missouri to the initial point, between the south margin of the Republican valley and the north margin of the Platte valley, to cross the one hundredth meridian, so as to connect with the main line westwardly of that initial point—authorize the Pacific Railroad Company, Eastern Division, to designate a route substantially like the one described in the map presented in February, 1866; and to file a map of the same within the extended time, and authorize the department, on those requirements being fulfilled, to withdraw the lands within fifteen miles of the new route from the market. *But it cannot with any success, or even plausibility of argument, be contended that after the expiration of the extended time such a designation of a new route could be made, with reference to the withdrawal of the public land from entry and market.* * * *

"*On the case stated in your letter, I am therefore clearly of the opinion that you cannot, without further authority of law, withdraw from pre-emption, private entry and sale, the lands upon the suggested new*

route of Union Pacific Railroad, Eastern Division as indicated in the map and communication transmitted to your department on February 21, 1866, by the president of the company" (Italics ours).

Thereupon, and on May 10, 1866, Senator Henderson introduced a bill (S. No. 317), which speedily passed both houses of Congress, was approved by the president and became the act of July 3, 1866.

During the discussion Senator Howard, who had charge of the bill for the Committee on Pacific Railroads, to which it had been referred, and which had reported it out for passage, spoke as follows:

> "By the act of 1862 all these eastern branches of the main stem were required to unite with the main stem on the one hundredth degree of longitude. Such was the effect of the act of 1862, incorporating the Union Pacific Railroad Company; but by the act of 1864, amending the original charter of the company, it is provided that any of these branches may unite with the main stem at a point west of the one hundredth meridian, if they shall see fit to do so. In this connection I will call the senator's attention to the ninth section of the act

of 1864. He will find it in the second proviso contained in that section. [Here the proviso is quoted.] It will be seen from that that the privilege of making the junction at a point west of the one hundredth degree of longitude has been secured to all these companies for some two years past.

"Now, in regard to the Pacific Railway, Eastern Division, it was required by the statute that that branch known as the Kansas Branch, should locate its route within a given period of time, which period has elapsed, and the object of the first section of this bill is simply to extend to that branch the right of locating its route until the first of December next. But the first section requires positively, in express terms, that the Eastern Division shall form a junction with the main stem of the Union Pacific Railroad Company at some point not more than fifty miles west of the meridian of Denver. They are not, therefore, at liberty to extend their route to a point further west than fifty miles west of Denver, without forming a junction with the main stem. Whether it will form a junction at that point or east of that point is not perfectly certain; but they are required positively by law to form the junction so that the Eastern Division may operate at all times as a feeder to the main trunk, the Union Pacific Railroad proper."

Senator Henderson, who had introduced the bill, spoke as follows:

"Now, Mr. President, one of the most energetic men of the West undertook the construction of the line from Kansas City out to the one hundredth meridian. In the meantime, before 1864, a survey was had along up the Smoky Hill fork. * * * Mr. Perry, who is the president of this road, finding that he could reach Denver City 134 miles nearer, over an easier route, with easier grades, less curves, and could make infinitely a better road, came here in 1864 and proposed to the senate that they should permit him to build up the Smoky Hill Fork instead of the Republican. And what did the senate do? Senators seem to understand that this is changing the route of the road. It is not so, by any means. This is no proposition to change the route of the road, as the distinguished senator from Michigan, who has charge of the bill, will bear me witness, and as he has already stated, the only effect in the world of this bill is to permit Mr. Perry now to file his plat, instead of filing it by the first day of July next. The original act gave him two years within which to file his plat; that act was passed on the first day of July, 1862. The two years expired on the first day of

July, 1862. In 1864, the senate will remember, we extended the time two years, and now the time would expire July 1, 1866. Mr. Perry has not quite completed his surveys, and wants now until the first day of October next. That was the way I introduced the bill. Senators will see by examining the bill that I proposed to give him until the first of October to file his plat, but the committee have extended the time to the first of December, which is much better than my proposition; but I did not know whether the senate would grant Mr. Perry that privilege. He is an energetic gentleman, one of the most honest, high-minded and energetic men of the West, and he is building a road in all sincerity, and is building it rapidly to connect us with the Pacific Coast.

"The legislation of this body in 1864, as read by the senator from Michigan, gave Mr. Perry the right to go up the Smoky Hill Fork, because it had been demonstrated even then to be the better route. Senators will find it in the ninth section of the act of that year, on page 371 of the laws of 1863 and 1864. [Here the provision is quoted.] * * * But senators are mistaken when they say that he is required now still to build upon that route [as prescribed by the act of 1862], because the legislation of 1864

permitted to build by this route, but it gave him no more money than if he built on the other route. He failed to file his plat within the time fixed, in order to get good surveys of this route since 1864. We have lost the right simply to file the plat. We might file it now between this time and the first of July. We have got time enough to do it, but we want to make further explorations and surveys. * * * It is asking nothing beyond what was given by the act of 1864, except to give these parties a little more time to designate the route."

Senator Guthrie said:

"Then [in 1864] Mr. Shoemaker represented to me that it is shorter to Denver city by more than one hundred miles. * * * I came then to the conclusion, and I firmly believe it now, that the government ought not to let this road be built on any other route than by the Smoky Hill Fork; and I am therefore against striking out the first section of the bill, which gives them further time to file their plat. It is only a continuation of the privilege Congress have given them to make the junction west of the one hundredth meridian."

Senator Howard said :

" But they [the branches] were all required, as the senator has very properly observed, by the act of 1862, to unite themselves with the main stem on the one hundredth degree of west longitude. By the legislation of 1864 these branches are authorized to make their junction with the main stem at any point they may see fit, west of the one hundredth degree of longitude, suiting their convenience and their interests."

Senator Stewart said :

" This bill is not for the purpose of granting any new right, but for the purpose of carrying out the original design ; first, that the main road shall be built from both ends ; secondly, that the Union Pacific Railroad, Eastern Division, shall have an extension of time within which to file its map, so that those men who have invested their money in good faith shall not be robbed. That is all there is in the bill."

When the bill reached the House Mr. Stevens, who had charge of the bill, said :

" This is a very short bill, and I gave notice yesterday that I would call it up today and ask a vote upon it. It, in fact, does not propose the enactment of a new

law; it is simply designed to correct a mistake in an act already passed. * * * Originally, these branch roads were to go to the initial point on the one hundredth meridian. The route of the Kansas branch ending at Fort Riley was to be fixed by the President. Two years were allowed them to file their maps in the office of the Secretary of the Interior, for the purpose of having the route designated. The President never fixed the route. Some time after, in 1864, application was made to the House to allow any one of these branches that chose to do so, to unite with the Union Pacific Railroad anywhere they chose, west of the one hundredth degree of longitude, provided they received no more bonds than if they went to the one hundredth degree. The act of 1864, which I hold in my hand, gave either of these branches a right to unite with the Union Pacific Railroad, and go westward as far as they pleased, without reference to the initial point, provided they should have no more than $16,000 per mile up to the one hundredth degree. That was the law last year. It extended the time for filing the map. After this Kansas route had been extended as far as Fort Riley and had already 116 or 120 miles in running order, they came to the conclusion that the best route was

upon Smoky Hill branch, which the engineers had long before believed to be the proper one. They filed maps for the purpose of taking up the Smoky Hill route, but the attorney-general decided that the maps were filed too late, not having been filed within the three years required. I do not think the opinion of the attorney-general was correct, because the initial point had never been fixed. The Kansas branch now comes and asks us to give them until the first of December next to file their maps and designate the route, the same as if it had been done within the first three years. That is the whole provision of the bill. So far as the Kansas route is concerned, it expressly says that they shall receive no more bonds than if they had gone by the other route. They only ask the right to file their maps between this and December next, and to take the same advantages under the law, to which this is a supplement, that those two acts gave them before. If any member will read those laws he must have an anxious desire to see a difference, if he can pervert it to mean anything but what I have stated."

Congressional Globe, First Session, 39th Congress, Part IV., pp. 3256, 3257, 3258, 3259, 3262, 3264, 3421, 3422.

During the 40th Congress, when the legislation in reference to the Denver Pacific Railway and Telegraph Company was under discussion, Senator Conkling said :

> " I have in my hand the evidence that on the 21st day of January, 1866, the president of the Pacific Railroad, Eastern Division, addressed to the then Secretary of the Interior, the honorable senator from Iowa [James Harlan], a letter giving notice formally that the original intention, as far as it had existed, to go up the Republican Fork, was abandoned ; and let me say just here that that purpose was formed a long time before and long before the war interrupted this work and interrupted surveys. On the day which I have fixed, notice was given, as I have said, to the Secretary of the Interior. * * * When the war was concluded and working parties were enabled to go out, the Eastern Division saw that another route was preferable to that, and proposed to file a map accordingly. The attorney-general, in an opinion which lies upon my desk, held that in point of time they were too late by some six months, because the law had fixed the limit, and the time had run ; and he advised that legislation was necessary to cure this difficulty in

matter of time. That legislation did not take place until a day later than that of which I am speaking."

Congressional Globe, Second Session, 40th Congress, Part V, page 4440.

Petitioners at pages 51–55 of their initial brief and at pages 16 to 19 of the supplemental brief, have quoted certain portions of the debates in Congress, but these must be read in connection with their context, and from the entire discussion the understanding is evident.

The same construction has been given to the act by the Supreme Court of the United States.

Kansas Pacific vs. Dunmeyer, 113 U. S., 629.

This case involved part of section 25, township 13 south, range 2 west of sixth P. M., Saline county, Kansas.

Kansas Pacific vs. Dunmeyer, 19 Kan., 540; 24 Kan., 725.

This was an odd-numbered section within the territorial limits of the grant appertaining to the line built up the Smoky Hill river route, but not that appertaining to the line indicated by the maps filed upon the Republican river route. It lay far to the west of Fort Riley, in Kansas, and would not have been included in the grant

if the connection with the main line had been made at the 100th meridian.

This Court says in *Kansas Pacific vs. Dunmeyer* (113 U. S., page 637):

> "At the time of the passage of the amendatory act of 1864 the general route of the road had not been designated, and therefore, the fifth section of that act says 'that the time for designating the general route of said railroad, and of filing the map of the same, and the time for completing of that part of the railroads, required by the terms of said act [of 1862], of each company, be, and the same is hereby, extended one year from the time in said act designated.'
>
> "It appears that in the year 1866, though the time for the designation of the general route had expired a year before, it had not yet been done or completed. To relieve the company from this failure to comply with the law, Congress enacted, July 3, 1866, 'that the Union Pacific Railway Company, Eastern Division (which is the branch now called the Kansas Pacific Railway Company), is hereby authorized to designate the general route of their said road and file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the gen-

eral route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from *sale* by order of the Secretary of the Interior.'

"It is under this latter statute that the railroad company, now plaintiff in error, filed its map of general designation of the route in the department of the interior, July 11, 1866, fifteen days before Miller's entry.

* * * * * *

"In the act of 1866, after the company had neglected for four years to make this designation of their general route, they were allowed six months longer, and no more, to file their map.

"The company had been negligent about filing this map. It was asking further time to do so as a favor. Congress said: We will grant you six months more, and when your map is filed the mere purchaser for money shall not be permitted to buy within the limit of your general route."

It thus clearly appears that the map of general route filed subsequent to the act of July 3, 1866, was the map contemplated, and the route thereon designated was a route authorized, by the act of July 2, 1864. The sole effect of the act of 1866 was to relieve the grantee in the previous

acts from the consequences of its failure to file the map and designate the general route within the time originally required. Therefore when the map was filed and the route designated the effect was the same as though these acts had been done within the time originally specified.

4. THE REQUIREMENT THAT A MAP OF GENERAL ROUTE BE FILED HAD NO RELATION TO THE RIGHT OF WAY GRANT. THERE WAS NO REQUIREMENT THAT A MAP OF DEFINITE LOCATION BE FILED. THEREFORE, THE FAILURE TO FILE EITHER OR BOTH MAPS, OR THE ACTUAL CONSTRUCTION UPON A LINE ENTIRELY DIFFERENT FROM THAT SPECIFIED IN THE MAP OF GENERAL ROUTE, COULD NOT AFFECT THE RIGHT OF WAY.

It will be observed that the acts of congress speak of the filing of a map of "the general route of said road as near as may be," and also mention the time when "the line of said road is definitely fixed" (see act of 1862, secs. 3 and 7; act of 1864, secs. 4 and 5; and act of 1866).

But while the acts of congress specifically mention the filing of the preliminary map of general route as near as may be, they are silent

concerning the method by which the line is to be definitely or finally located.

Kansas Pacific R. Co. vs. Dunmeyer, 113 U. S., 629, 634.
M., K. & T. R. R. Co. vs. Kansas Pac. R. Co., 97 U. S., 491.
Van Wyck vs. Knevals, 106 U. S., 360.
Kansas Pac. R. Co. vs. A., T. & S. F. Ry. Co., 112 U. S., 417.
Walden vs. Knevals, 114 U. S., 373.
Knevals vs. Hyde, 6 Fed., 651.
United States vs. McLaughlin, 30 Fed., 147.

By the cases just cited it was determined that while the acts of congress were silent as to the manner in which the line was to be definitely fixed or finally located, yet, since the date of the definite location of the line was of immense importance, both to the railroad company and to settlers, in so far as the odd-numbered sections were concerned (but not in so far as the right of way was concerned), it was held that the line might be definitely fixed by the approval and adoption by the railroad company of the survey thereof and the plat showing the same, and the filing of said plat with the Secretary of the Interior. This map of definite location was, of course, something entirely different and distinct

from the map of general route. But neither the map of general route nor the map of definite location had any connection whatsoever with the grant of the right of way; both had to do with the grant of the odd-numbered sections. The one was for the purpose of furnishing the land officers with information upon which they could withdraw from entry and sale such number of sections as ought to be sufficient in any event to satisfy the grant of odd-numbered sections; the other for the purpose of definitely fixing the time after which the attaching of homestead or pre-emption claims could not affect the title of the railroad company to the odd-numbered sections and of exactly identifying said sections.

In case of the right of way, however, neither map was required, either by the provisions of the act, the practice of the land department or the decisions of the courts. So far as the right of way was concerned, the grant took effect from the date of the act, and the lands granted might be made definite either by filing a map of definite location or by actual construction. In either event, the title to the lands, when thus identified, related back to the date of the act.

Central Pac. vs. Dyer, 1 Saw., 641.

Northern Pac. vs. Smith, 171 U. S., 260.

Union Pacific vs. Douglas County, 31 Fed., 540.

Railroad Co. vs. Baldwin, 103 U. S., 426.

Oregon Short Line vs. Quigley, 10 Idaho, 770.

Wilkinson vs. Northern Pac. R. Co., 5 Mont., 547.

Jamestown Co. vs. Jones, 177 U. S., 125.

D. & R. G. R. Co. vs. Hanoum, 19 Colo., 162.

In *Central Pacific vs. Dyer, supra*, Mr. Justice FIELD was considering the same acts of congress involved in the present action, and upon this point he says:

> "The grant of the right of way is a present grant, operating immediately upon the passage of the act, without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the pass-

age of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section apply only to the grants of lands therein mentioned, and do not apply to the grant of the right of way made in the second section.

"*The provisions of the seventh section, requiring the plaintiff within two years to designate the general route of the road, as near as might be, and file a map of the same in the department of the interior, in no respect affects the grant of the right of way; it only furnished the means by which the secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private sale and entry.*" (Italics ours.)

In *Northern Pacific vs. Smith, supra*, wherein the court was considering the Northern Pacific acts, substantially the same in all particulars as those relating to the Union Pacific, it was held (page 267): That all which the railroad company need prove to show title in itself under the right of way grant was (1) the act making the grant; (2) that in pursuance of the grant the railroad company had constructed its road across the land in dispute; (3) that commissioners appointed by the president had examined and ap-

proved the same and recommended its acceptance by the government; (4) that said report had been approved by the president; and (5) that the company and its successors had maintained and operated said road since its construction to the time of trial. The Supreme Court says that "undoubtedly there was thus disclosed a *prima facie* title and right of possession of the disputed tract," under the act of congress.

All of these things were shown in detail by the evidence on behalf of appellee in the case at bar.

Again, in the same case, the Supreme Court says (page 270):

> "To acquire the benefit tendered by the act of 1864, nothing more was necessary than for the road to be constructed. The railroad company, by accepting the offer of the government, obtained a grant of the right of way, which was at least perfectly good as against the government."

The act of March 3, 1875 (18 Statutes at Large, 482), which grants the right of way over the public lands to any properly organized railroad company complying with its terms, expressly requires the filing of a map of definite

location, and the approval of the same; but notwithstanding this express requirement, it has frequently been held that the road may be definitely located by construction alone, without the filing of any map.

In *Jamestown Company vs. Jones*, *supra*, it was determined by the Supreme Court that even under the act of 1875 the railroad company might be definitely located by construction alone, the opinion concluding with these words:

> "This conclusion does not conflict with the docrine announced in *Van Wyck v. Knevels*, 108 U. S., 360, and in *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S., 629, that the title to lands passing under railroad land grants is considered as established at the date of filing of the map of definite location. The same question is not here presented. Different considerations apply to the grant of land than to the grant of the right of way."

If this be true under the act of 1875, which expressly requires the filing of a map of definite location, how much the more must it be true under the Pacific Railroad acts, which make no such requirement.

We submit, therefore, that the rights of the

railroad company under the grant of right of way were not affected by the fact that in the case at bar it failed to prove the filing of a map of definite location for this portion of its line, but proved only actual construction thereof over the lands in controversy here.

It has been held, however, in respect to the grant of right of way, that where the line of the railroad has once been definitely located, either by the filing of a map of definite location or by the construction of the railroad, and the rights of third parties have intervened in reliance upon such definite location, no subsequent change of the line can affect such intervening rights.

M., K. & T. R. Co. vs. Cook, 163 U. S., 491.

Smith vs. Northern Pac. R. Co., 58 Fed., 513.

Northern Pac. R. Co. vs. Smith, 171 U. S., 260.

Some doubt is thrown upon the correctness, even of this doctrine, by the language of the Supreme Court in the *Smith case*, wherein it is said (page 270) that it is—

> "* * * conceded, but not decided, that the railroad company, when it changed its route after the filing of its map of definite

> location, lost its priority of right under grant of the act of 1864 as against subsequent grantees of the United States, who obtained title before the actual construction of the road."

But, however that may be, the doctrine has no application here, for in the case at bar there was no definite location, a subsequent change thereof and intervening rights to be protected.

So far as the proof in this case shows, the railroad established across the lands claimed by appellants was never definitely located until actually constructed thereover. And as said in *M., K. & T. vs. Cook*, *supra* (page 497):

> " Before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road."

But even if there had been an express requirement in the act that a map of definite location be filed, yet the failure to file the same, like the failure to make the reports required by section 20 of the act of 1862, adverted to by the appellants, or the failure, if such failure had occurred, to complete the line of railroad within the time required, would not avail appellants. These and similar requirements, if conditions at all, which,

we dispute, were conditions subsequent, for the title to the lands embraced within the right of way had vested before the time when any of these acts were required to be done. Viewed in that light, a failure on the part of the railroad company to fulfil any or all of such requirements cannot be taken advantage of by a private individual. That privilege rests with the United States alone.

Schulenberg vs. Harriman, 21 Wall., 44, at 62.

Van Wyck vs. Knevals, 106 U. S., 360.

Railroad Co. vs. McGee, 115 U. S., 469.

Bybee vs. Oregon &c. Ry. Co., 26 Fed., 586, at 588.

Same case, 139 U. S., 663, 673, 674, 679, 680, 681.

Railroad Co. vs. Mingus, 165 U. S., 414, 431.

U. S. vs. Northern Pac. R. Co., 177 U. S., 435.

Denny vs. Dodson, 32 Fed., 899.

Utah N. &c. R. Co. vs. Utah &c. Ry. Co., 110 Fed., 879.

C., R. I. & P. R. Co. vs. Grinnell, 51 Ia., 476.

Not only has the United States failed to take any advantage of the railroad company's failure to fully perform its obligations, if any such failure has occurred, but, on the contrary, has approved and accepted the railroad as constructed; and through its land department has, by patent, conveyed to the railroad company and its successors in title the odd-numbered sections for 20 miles on each side of the line of railroad, in accordance with the provisions of the act, thus fully confirming the railroad company's title, not only to the odd-numbered sections, but also to the right of way.

Upon the foregoing discussion we submit:

(*a*) That the right of way was granted by the act of 186[illegible], which preceded the initiation of appellants' title.

(*b*) That the acts of congress did not require the filing of a map of definite location; therefore, the failure to file said map could not affect the grant.

(*c*) That the provision relating to map of general route had no reference to nor bearing upon the grant of right of way; its sole purpose was to aid the railroad company by preventing odd-numbered sections which might fall within the

limits of its land grant, when definitely located, from being taken by individual appropriators, and so excepted from the grant of odd-numbered sections under the reservations contained in section 3 of the act of 1862.

(*d*) That in the instant case the line of railroad was not definitely located until the actual construction thereof, upon which the grant of the right of way attached to the line as so constructed, but took effect as of the date of the act of 1864. It follows that if the railroad company failed to file the map of general route, or, having filed a map of general route, constructed its line upon a different route, the sole effect would be to cause it to lose some of the odd-numbered sections which otherwise it might have had under that section of the grant relating to the same. But the right of way grant would be in no manner impaired. This was the ruling of the Attorney General with respect to this very line of railroad in the Opinion quoted *supra*, announced in 1866 and reported in Vol. 11, Opinions of Attorney General, p. 462.

FOURTH POINT.

Contentions of petitioners and appellants respecting appellee's title.

It is proper to assume that in the judgment of appellants, appellee's claims under the acts of congress are sustainable except in those particulars specifically indicated in appellants' argument. It may shorten the discussion to devote the remaining portion of this brief to those specific contentions. From this point on, therefore, we shall adopt that method.

1. CONTENTION THAT THE ACTS OF CONGRESS MUST BE STRICTLY CONSTRUED.

This contention is set forth at page 25 of their brief, and again referred to at page 37. To this point they cite *Leavenworth, &c., R. Co. vs. United States*, 92 U. S., 733. This decision had reference to a grant of quite a different nature from that under which appellee claims. The correct rules of construction to be applied to the Pacific railroad acts have several times been stated. The matter is fully discussed and the authorities applicable cited in the preceding subdivision of this brief, to which we now refer (see *supra*, Third Point, subd. I., p. 41).

2. CONTENTION THAT THE RIGHT OF WAY GRANT TAKES EFFECT, NOT AS OF THE DATE OF THE ACT OF CONGRESS, BUT AT SOME SUBSEQUENT DATE.

The discussion of this subject will be found at pages 27 to 37 of petitioners' brief, and the conclusions drawn are stated at page 37 as follows;

"It takes effect: (*a*) From the date of an act of congress specifically describing it and giving its termini; or (*b*) when maps are required to define it, from the date of filing such maps showing its location across the particular land; or (*c*) from date of actual construction of the line."

In view of the many decisions already cited upon this point, it seems unnecessary to reply further to that portion of the present contention, wherein it is maintained that the grant of right of way attached, not at the date of the act, but either at the date of filing map of general route or map of definite location, or at the date of actual construction of the line.

Appellants here fall into the common error of confusing the grant of the right of way with the grant of the odd-numbered sections. Under the authorities hereinbefore cited there is no merit in the contention so far as the right of way grant

is concerned. It is now settled beyond doubt that such grant takes effect as of the date of the act.

The assertion that appellee's predecessor in title never filed a map is untrue in point of fact. The map of general route was filed, and evidence thereof appears in the present record (Exhibit "H," Record, page 156). It is true, however, that there is no evidence in this record of the filing of a map of definite location, but there is no requirement in any of the acts of congress that a map of definite location should be filed. The requirement is that the line be "definitely fixed" or "finally located." As to how this definite fixing or final location of the route is to be accomplished the act is silent. The implication in that branch of appellants' argument hereinabove designated "(*a*)" is that, while the right of way grant might take effect from the date of an act of congress specifically describing the route and giving both of its termini, it does not take effect otherwise. But the authorities set forth in a previous portion of this argument expressly negative that contention (see, *supra*, Third Point, subd. 2, p. 48).

3. CONTENTION THAT THE ACT OF 1864 DID NOT AUTHORIZE THE LINE OF RAILROAD AFTERWARD CONSTRUCTED.

(*a*) *Significance of the words "this act" used in the act of 1864.*

The contention is made and many times repeated that the words "this act" used in the proviso to section 9 of the act of 1864 relate solely to the enactment of 1864, and can have reference to nothing not expressly set forth therein, from which the conclusion is drawn that said proviso did not refer at all to the predecessor of the appellee company, because the privilege extended by the proviso is offered only to "any company authorized by *this act* to construct its road and telegraph line from the Missouri river," etc., and appellee's predecessor was not so authorized by the act of 1864; and the further conclusion is drawn that in any event the roads referred to in said proviso were to have no grant of right of way for any line constructed thereunder, because "such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of *this act*." In support of the argument it is said (petitioners' brief, pp. 63 *et seq.*), that the proviso to section 9 refers ex-

clusively to the new Sioux City Company and the B. & M. R. R. Co., mentioned in sections 17 and 18 thereof. But this contention is negatived by the language of the proviso in question standing alone, for its introductory words are "that any company authorized by *this act* to construct its road and telegraph line from the Missouri river to the *initial point aforesaid*," etc. But the "initial point aforesaid" is nowhere mentioned in the act of 1864; for that we must look to the act of 1862. Moreover, neither the Sioux City branch nor the Burlington and Missouri River Railroad mentioned in sections 17 and 18 were authorized to construct "to the initial point aforesaid," to-wit, the one hundredth meridian, for, by section 17, the Sioux City branch was to be built "so as to connect with the Iowa branch of Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select," there being no reference to the initial point of the Union Pacific. And the Burlington and Missouri River Railroad, by section 18, was required to construct its road "to some point not farther west than the one hundredth meridian of west longitude, so as to connect by the most practicable route with the main trunk of the Union Pacific Railroad or

that part of it which runs from Omaha to said one hundredth meridian of west longitude," from which it plainly appears that neither the Sioux City branch nor the Burlington and Missouri River Railroad was a "company authorized by *this act* to construct its road and telegraph line from the Missouri river to the *initial point aforesaid.*" Consequently, we must look beyond the act of 1864 for a company to which the language of the proviso to section 9 would be applicable, and necessarily we must look to the act of 1862, of which the act of 1864 was amendatory.

In making this contention counsel entirely overlook the nature of the act of 1864. It was an amendatory statute and so declared to be in its title. By the act of 1864 a number of changes were made in the act of 1862, and from and after the passage of the act of 1864 the act of 1862 was to be read as though the changes made in 1864 had originally been written in the act of 1862 at the time of its passage, and the enactment was to be given that effect, except, possibly, as to rights which had intervened after the passage of the act of 1862 and before the passage of that of 1864. It is a well-settled rule of statutory con-

struction that when an act of the legislature has been amended by a subsequent statute the two are to be read as one act. This rule, with the authorities sustaining the same, has been hereinbefore fully set forth (see *supra*, Third Point, Subd. 1, p. 41). The argument of petitioners is ingenious, but will not bear analysis. It does violence to the settled rule of construction already adverted to, which requires an original and an amendatory act to be read together as one, and which further requires that the provisions of the amendatory act be considered as interpolated in the original act, and construed with all of the provisions of the original act as though they had been there from the beginning.

Moreover, the words "this act" are used throughout the act of 1864 in reference to the act of 1862, as amended by the act of 1864. This is evident from the very section here under consideration. Section 9 gives authority to connect westwardly of the 100th meridian to "any company authorized by *this Act* to construct its road and telegraph line from the Missouri river to the initial point." But the act of 1864 does not give such authority to any company. For that we must look to the act of 1862.

Moreover, said section 9, after providing that

for so much of the road as might be a departure from the original line "such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of *this Act*," proceeds as follows:

> "Provided, further, however, That the bonds of the United States shall not be issued to such company for a greater amount than as *hereinbefore* provided, if the same had united with the Union Pacific road on the 100th degree of longitude," etc.

But if the benefits conferred had been confined to those expressly granted by the act of 1864, there would have been no necessity for this saving clause, because nowhere in the act of 1864 is there any bond aid whatsoever provided, so that evidently in the use of the words "this act" and "hereinbefore" congress had reference to the act of 1862.

At the end of section 11 of the act it is provided "that no land granted by *this Act* shall be conveyed to any party or parties," etc. But there is no land expressly granted by the act of 1864, and, beyond question, the reference is to the act of 1862, as amended by the act of 1864.

By section 16 of the act provision is made for the consolidation of "any two or more of the

companies authorized to participate in the benefits of *this Act*." And it is provided that after such consolidation the consolidated company shall " succeed to, possess and be entitled to receive from the government of the United States all and singular the grants, benefits, immunities, guaranties, acts and things to be done and performed, and be subject to the same terms and conditions, restrictions and requirements which said companies respectively at the time of such consolidation are or may be entitled or subject to under *this act*," etc.

It is perfectly evident that this language refers to the grants, benefits and immunities, conditions, restrictions and requirements, not solely of the act of 1864, but of the entire body of legislation upon the subject, namely, the act of 1862, as amended by the act of 1864. And this construction has been given by the courts to the section here under consideration.

United States vs. Stanford (C. C. A., 9th Cir.), 70 Fed., 346.

By section 21 of the act it is provided " that before any land granted *by this act* shall be conveyed to any company or party entitled thereto under this act," the cost of surveying, selecting

and conveying the same shall be paid into the United States treasury, etc. But no lands are granted expressly by the act of 1864. The reference, therefore, by the words "this act" must be to the act of 1862, as amended by the act of 1864; and the Supreme Court of the United States, in construing this sentence, has so held.

Kansas Pac. R. Co. vs. Prescott, 16 Wall., 603.

Union Pac. R. Co. vs. McShane, 22 Wall., 444.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

(*b*) *Contention that the act of 1864 did not contemplate a departure from the original line sufficiently far to the west to cross the lands here in question.*

We have carefully considered this contention, and are unable to appreciate its force. It does violence to the language of the proviso to section 9 of the act, which was that the connection with the Union Pacific might be made "at *any point* westwardly of such initial point," and not substantially at said initial point, as petitioners contend. The contention is expressly negatived by the authorities hereinbefore cited.

(See Third Point, subd. 3, *supra*, p. 58).

Moreover, counsel misread the act when they say, at page 38 of their brief, that the connection was to be made "at the 100th meridian or as near that point as convenient and practicable," and when they again say that said companies were to build "only to a 'convenient and practicable' connection with the U. P. R. R., at or near the 100th meridian." Not only does the act permit said connection to be made "at *any point* westwardly of such initial point," but it provides that this may be done in case any such company shall deem such westward connection "more practicable or *desirable*."

(*c*) *Contention that the act of 1864 extended a mere option, which could only be availed of by filing a map thereunder.*

This contention is made at page 38 of the brief of petitioners, and it is there stated that appellee's predecessor "never filed such map under the act of 1864, but on the contrary, renewed its old filing under the act of 1862, and rejected the option tendered;" and the contention is repeated at page 42, paragraph (*e*), and at page 43, paragraph (*d*).

If it be true that the act of 1864 extended an option merely, what justification is there for the

conclusion that so far as the right of way is concerned that option could be accepted only by the filing of a map, and that unless it was so accepted the option lapsed? The permission contained in the proviso to section 9 of the act of 1864 was that any line of railroad therein referred to "may construct its road and telegraph line" so as to connect at any point westwardly of the 100th meridian. This language imports that the acceptance of the option was to be evidenced by the construction, and not by the filing of a map.

We have hereinbefore pointed out (Third Point, subd. 4, p. 76) that neither the map of general route nor the map of definite location had any relation whatsoever to the grant of right of way. This being true, the only thing necessary to be done by any company desiring the westerly connection was to construct its road to such connection, in which event the right of way grant would attach to the the railroad so constructed. It might be that upon failure to file a map of general route it would lose some or perhaps all of the odd-numbered sections included in the original grant, but the right of way grant would remain unimpaired. Since the failure to file a map of general route could have no effect, it is equally

clear that the attempted filing of a map of general route subsequent to the act of 1864, designating a route other than that upon which construction finally occurred, would likewise be without effect. There is no evidence in this record that any such map was in fact filed. Petitioners' information upon this subject is derived from a statement contained in this Court's opinion in the case of *Missouri, &c., Ry. Co. vs. Kansas Pacific Ry. Co.*, 97 U. S., 491, 494, quoted at page 45 of their brief. But in that same opinion it is stated that said attempted filing was futile, the route never having been approved by the President, and that no withdrawal of lands occurred based thereon. The map so attempted to be filed was, of course, a map of general route, and section 9 of the original act of 1862 had required "the route in Kansas west of the meridian of Fort Riley * * * to be subject to the approval of the President of the United States and to be determined by him on actual survey." The reasons why one map of general route was not approved and no withdrawal of lands made thereunder are fully set forth in the opinion of the attorney-general, extracts from which we have hereinbefore printed (see Third Point, subd. 3, p. 61). But if the filing of a map of general route

had been of importance, the act of 1864, as subsequently amendedt by the act of 1866, was exactly complied with in that regard, for the effect of the latter act was merely to extend the time within which the map of general route specified in the act of 1862 might be filed.

(*d*) *Contention that the act of 1866 constituted a legislative construction of the proviso to section 9 of the act of 1864.*

But it is asserted that the words "as now required by law" contained in the act of 1866 (14 Stats., 79), constitute a legislative construction that, notwithstanding the plain language of the act of 1864, as hereinabove set forth, the Kansas line was thereafter and until the passage of the act of 1866 still "required by law" to connect with the main line at the 100th meridian. This contention was made in this case in the court below and was discussed in the opinion of the Circuit Court of Appeals (*Stuart vs. U. P. R. R. Co.*, 178 Fed., 762, 763). Little can be added to what was said by the learned court below upon this subject.

There can be no doubt that the meaning of the act of 1864 was perfectly clear. It was construed by the attorney general, applied by the executive departments, examined and its mean-

ing declared by the courts, and those who enacted it expressly announced what they intended to enact. All agreed that by the act of 1864 the Kansas branch was authorized to construct the line of railroad here in controversy.

Bearing in mind that the grant of the right of way was a present grant, and took effect immediately upon the passege of the act which authorized the line of railroad, the Kansas branch immediately became vested with title to said right of way; therefore, if the act of 1866 be given the construction contended for by petitioners, the effect will be to repeal the plain provision of the prior act, and by that operation divest a vested property right. This repeal would operate by implication, but, as is well known, repeals by implication are not favored. The authorities to that effect are cited in the opinion of the Circuit Court of Appeals (178 Fed., 763).

The general rule, as declared by this Court, is that the repeal of statutes by implication is unfavored by law. It is not to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs.

Osborn vs. Nicholson, 13 Wall., 654, 662.

That construction which would declare the later of two statutes to be a repeal of the powers conferred by a prior, and have the effect of unsettling titles to lands, a court should be astute to avoid.

Doolittle vs. Bryan, 14 How., 563.

The same rule applies if the later act be regarded merely as a legislative construction of the language of the prior act; for, as was held in *Ogden vs. Blackledge*, 2 Cranch, 275, a declaratory statute cannot have the legal effect of changing the rule of construction as to a pre-existing law.

In *Koshkonong vs. Burton*, 104 U. S., 668, 669, this Court held that the utmost effect to be given to a subsequent legislative declaration as to what was the proper meaning of prior statutes which had been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions.

And in *Reynolds vs. McArthur*, 2 Pet., 417, 435, the court said:

> "But to go back to titles already acquired, to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact,

and to adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative, power. This construction can never be admitted by the court, unless it be rendered indispensable by the language of the act. We do not think that the language in this act does require it."

The act of 1866 was passed solely to enable the railroad company to preserve its grant to odd-numbered sections. This is clearly evident from the opinion of the attorney general, the discussions in congress, and the decisions of the courts cited in a previous portion of this brief (Third Point, subd. 3, p. 58).

If the act of 1866 had never been passed, the railroad company might have proceeded to construct its line, and would have been entitled to right of way therefor. How can it justly be said that the act of 1863 changes this situation? The words "as now required by law" plainly refer to the existing requirement of law, that for that portion of the line west of 100th meridian the campany should have no bond aid, and do not refer to any supposed existing requirement that at the date of the act of 1866 the connection was required to be made at the 100th meridian.

(e) *The fact that the railroad company placed fences on the fifty-foot line is of no significance.*

Petitioners, in their argument, several times refer to the fact above mentioned. But the fact is of no significance. There is now, and for several years has been, a statute of Colorado requiring railroad companies to place fences on either side of their tracks, to keep stock from straying thereon and suffering injury (Colo. Session Laws 1891, p. 283; 1902, pp. 23 and 24; Rev. Stats. 1908, p. 1290, Sec. 5480).

These statutes have required that the "road" be fenced. The fences in question, therefore, were placed not to mark the outer limits of the property claimed by the railroad company, but merely to comply with the act in question and to keep straying stock from the tracks. The fact that they were not placed upon the exterior boundary of the 400-foot strip cannot in any manner aid the case of the petitioners. The exact point has been decided.

Kindred vs. Union Pacific, 168 Fed., 648, 654; 225 U. S., 582.

See also:

Slocumb vs. C. B. & Q. R. Co., 57 Ia., 675.

East Tenn., V. & G. vs. Telford, Executors, 89 Tenn., 294.
L. & N. R. R. Co. vs. French, 100 Tenn., 409.
Penn. R. R. Co. vs. Freeport, 138 Pa. St., 91.
Sapp vs. Railroad Co., 51 Md., 115.
U. P. Ry. vs. Kindred, 43 Kan., 134.
McLucas vs. St. Joe & Grand Island Ry. Co., 67 Neb., 603, 612.
Roberts vs. Sioux City & Pacific Ry. Co., 73 Neb., 8.
Moran vs. C. B. & Q. R. R., 83 Neb., 680.

Moreover, as Exhibit A shows, other railroad improvements such as snow fences, had been placed and were maintained at least one hundred and fifty feet from the track and outside of the stock fences (Record, page 115).

4. PETITIONERS' CONTENTIONS RESPECTING ADVERSE POSSESSION AND PAYMENT OF TAXES.

These contentions are expounded at pages 38 to 40 and at page 78 of petitioners' brief. There are several sufficient answers thereto:

(*a*) Complainants did not by their pleadings assert any claim under any statute of the State relative to adverse possession or limitation.

Rec., pages 3 and 14.

Wood vs. Chapman, 24 Colo., 134, 135.
Sec. Co. vs. Wolfe, 27 Colo., 218.
Webber vs. Wannemaker, 39 Colo., 425, 431, 432.

(*b*) The court below found that both parties had paid taxes upon the property in controversy during all of the time involved, and this finding is conclusive (178 Fed., 755).

(*c*) As a matter of fact, there was no competent evidence that complainants or their predecessors in title continuously paid taxes for any particular period of time. We do not concede, as stated in their brief, that they and their predecessors in title had continuously paid taxes upon these lands for the period of time prescribed by the statutes of Colorado in reference to the acquirement of adverse rights thereby. On the contrary, we state without fear of successful contradiction that the evidence fails to show any such continuous payment of taxes for the statutory period.

Rec., page 32. Exhibits 8, 9, 10, Record, pp. 82, 84, 87.
Rec., pp. 35, 37, 44, 50, 51, 55, 56, 57.
Evans vs. Welch, 29 Colo., 355, 364.

Brinker vs. U. P. D. & G., 11 Colo. App., 166, 171.
Webber vs. Wannemaker (*supra*), 434.
Warren vs. Adams, 19 Colo., 515, 525.
Knight vs. Lawrence, 19 Colo., 425, 431.
1 Cyc., 1106, 1109 (n. 26).
Irving vs. Brownell, 11 Ill., 402.
Wettig vs. Bowman, 47 Ill., 17.
Hurlbut vs. Bradford, 109 Ill., 397, 400.
Berry vs. Burton, 111 Ill., 138, 143, 144.
McCauley vs. Mahon, 174 Ill., 384, 386.

(*d*) It is not true, as stated at page 70 of petitioners' brief, that the statutes of Colorado relative to the assessment of railroad property by the State board of equalization originated in the year 1902. On the contrary, the first act on this subject was passed on March 20, 1877 (Gen. Laws Colo., 1877, page 745) and this method of assessment has been in effect ever since. Even though the State board of equalization had wholly failed to assess the property, any assessment of the local assessor would have

been utterly void, for the matter was beyond his jurisdiction.

Carlisle vs. Pullman Co., 8 Colo., 320.
Burlington & Missouri River Co. vs. Lancaster County, 15 Neb., 251.
Union Pac. R. Co. vs. Keener, 31 Fed., 126.
Denver Co. vs. Doelz, 49 Colo., 48, 50.

(*e*) But in any event, State statutes relative to adverse possession, payment of taxes and the like are wholly ineffective as against the right of way granted by the Pacific railroad acts. Neither adverse possession nor estoppel of any sort avails to affect the title to such right of way held by the grantee or its successors.

Northern Pac. Ry. Co. vs. Smith, 171 U. S., 260.
Northern Pac. Ry. Co. vs. Townsend, 190 U. S., 267.
U. S. vs. Michigan, 190 U. S., 379, at 398.
Baltimore Co. vs. Baltimore, 195 U. S., 375, at 382.
Northern Pac. vs. Ely, 197 U. S., 5.
Northern Pac. vs. Hasse, 197 U. S., 9.
Kindred vs. Union Pacific, 168 Fed., 652.
Same case affirmed, 225 U. S., 582, 597.

5. Appellants' authorities.

(*a*) *Generally considered.*

It is unnecessary to review all of the authorities cited by appellants. None of them sustain the contentions in support of which they are cited. They may properly be divided into two classes, and, so classified, distinguished from the case at bar.

A large number of the cases cited relate to and construe the act of March 3, 1875 (18 Stats., 482), which provides a general method whereby railroad companies may, by compliance with the act, acquire a right of way across the public lands.

The distinction between the act of 1875 and the Pacific Railroad acts is marked, and has previously been observed by the courts.

The act of 1875 is a general act granting the right of way to all properly organized railroad companies complying with its terms. The grant did not take effect, in any particular instance, until the railroad company, seeking to acquire right of way thereunder, had complied with the act and had definitely located its line, either by actual construction or by the filing of a map of definite location. Whereas the grant

of right of way made by the Pacific Railroad acts took effect from the date of the act. By the express language of the act of 1875 possessory claims on the public lands were excepted from the operation of the grant when it did take effect. The courts have so construed section 3 of the act requiring "possessory claims on the public lands" to be condemned; and section 4 of the act providing that only after definite location of the line of railroad has been made, either by filing the map or constructing the line of road, shall lands over which such right of way may pass "be disposed of subject to such right of way."

The Pacific Railroad acts in respect to right of way have received exactly the opposite construction, and, as has been shown, the courts hold that after the passage of the act of congress all public lands must be disposed of subject to the right of way, without regard to the date of definite location of the road.

Washington, etc., R. R. Co. vs. Osborn, 160 U. S., 103.

Spokane Falls, etc., R. R. Co. vs. Ziegler, 167 U. S., 65.

D. & R. G. R. R. Co. vs. Wilson, 28 Colo., 6.

Jamestown Company vs. Jones, 7 N D., 619.
Same case, 177 U. S., 125.
Minn., etc., Company vs. Doughty, 208 U. S., 251.

The other class of cases cited by appellants consists of decisions relating to the grant of the odd-numbered sections made to the Pacific railroads by the respective acts of congress, and not to the grant of the right of way.

The distinction between the grant by the Pacific Railroad acts of the odd-numbered sections and the grant by the same acts of land for right of way has been so clearly pointed out in the numerous authorities cited by us in the foregoing pages that it is quite unnecessary to enlarge upon it here. That distinction lies in the fact that the grant of the odd-numbered sections was subject to exceptions, among which were that mineral lands should not be conveyed thereby, nor should any lands be thereby conveyed to which at the time of the definite location of the railroad a preemption or homestead claim might have attached. The grant of right of way, on the other hand, was *in praesenti*, and subject to no exceptions whatsoever. It is clear that decisions which construe and apply to the grant of odd-numbered sec-

tions can have no possible bearing upon the proper construction of the grant of right of way. Not one of the cases cited by appellants furnishes an authority in any manner conflicting with the well settled doctrines by which appellee's title is fixed.

(*b*) *Union Pacific Railroad Co. vs. Harris, 215 U. S., is not controlling.*

The case mentioned in the foregoing headline is much relied upon by the petitioners. It was presented to and carefully considered by the Circuit Court of Appeals in this case and was held to be inapplicable to to the present case (178 Fed., 763, 764). We can add nothing to the very clear exposition of the subject contained in the opinion of the Circuit Court of Appeals.

We respectfully submit that, as a matter of logic, what is there said is unanswerable.

Petitioners and appellants place their reliance upon the following statement of Mr. Justice BREWER, in the course of his opinion in the *Harris case* (p. 389):

> "Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862,

> yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it."

But this observation had nothing to do with the case which was then before the court. The rights of Harris' predecessor in title originated in the year 1861, and were continuously preserved thereafter, so that the patent when issued related back to the initial step. It follows that, whether the right of way of the railroad company was granted by the act of 1862, that of 1864 or that of 1866, it could not prevail against the title of the individual. Therefore, it was wholly unnecessary to determine by which act the particular line of railroad in question was first authorized. For that reason, the language relied upon by the petitioners in this case is a remark and not a determination, a dictum and not a decision, and, inasmuch as the matter was one of no importance to the case in hand, the statement was doubtless made by Mr. Justice BREWER without the investigation which would at once have convinced the learned justice of his error.

The oft quoted words of Chief Justice MARSHALL in *Cohens vs. Virginia*, 6 Wheat., 264, 399, are peculiarly applicable.

It is manifest that if the Harris decision be given the effect contended for by the petitioners, it amounts to a complete reversal of the attitude of this Court respecting the acts of congress. We cannot believe that such was the intention of this Court, in view of its own previous decisions, the very plain language of the statute itself, and the construction continuously placed thereon both by the legislative and executive branches of the government.

Such a result would be *ex post facto* construction, and as has been held, "*ex post facto* construction is as pernicious as *ex post facto* legislation.

Erbaugh vs. United States, 173 Fed., 433, and cases there cited.

Gelpcke vs. City of Dubuque, 1 Wall., 175.

The railroad has been built, securities have been issued, and capital has been invested, upon the faith of the prior construction of the acts. This alone furnishes a persuasive, if not a conclusive, argument against the reversal of the former rulings.

Indeed, the record in the instant case furnishes an illustration of the wholly inequitable result which would follow a change of the former rulings; for in the case at bar, in reliance upon

the settled construction of the acts of congress, as announced by prior decisions of this Court, it was by the answer admitted that the predecessor in title of the petitioners filed his declaratory statement, under the pre-emption act, a few days prior to the act of 1866, and that, pursuant thereto, he made his final entry and purchased and paid for the lands on January 2, 1867. This concession could safely be made in view of previous decisions of this Court that the act of 1864 authorized the line of railroad here in question. But the fact is that, while petitioners' predecessor in title filed his declaratory statement on June 18, 1866 (Exhibit 16, Record, p. 96), there is no evidence whatever that he continued in possession for a single day subsequent to said June 18, the proof showing, on the contrary, that he abandoned his pre-emption rights, and on January 2, 1867, subsequent to the passage of the act of July 3, 1866, initiated new rights by locating a military land warrant upon the same lands (Exhibit 2, Record, p. 72), and received patent on said location and not under the pre-emption laws, or pursuant to his pre-emption filing (Exhibit 4, Record, pp. 75 and 76).

The register's certificate produced by appel-

lants for the purpose of showing final entry under the pre-emption claim of Eastman not only fails to prove such final entry and purchase, but, on the contrary, conclusively disproves the same. It is perfectly evident from the form of this certificate that it is neither a receiver's receipt nor a register's certificate of final entry under the pre-emption laws. It evidences a right under a wholly different statute of the United States, which right was initiated on January 2, 1897. The statute referred to is the military bounty land act of March 3, 1855, found in 10 Statutes, page 701. That this certificate did not evidence a final entry under a pre-emption claim is further made clear beyond the possibility of a doubt by the recital to the effect that said location was allowed "subject to any pre-emption claim which may be filed for said land within forty days from this date." This proviso in the certificate was inserted pursuant to authority of section 3 of the act of September 28, 1850 (9 Stats., p. 520), and the regulations of the Secretary of the Interior promulgated pursuant thereto (*Copp's Public Land Laws*, Vol. 2, pp. 990 and 991: *Lester's Land Laws, Regulations and Decisions*, pp. 579, 582, 583, 599, 606, 616, 620). Undoubtedly the original claimant abandoned

his right of purchase under the pre-emption laws and acquired his title under rights initiated on January 2, 1867 (See patent, exhibit 4, Record, p. 76). It is settled beyond the possibility of a doubt with reference to pre-emption filings, that even under the act of March 3, 1875, the subsequent abandonment or relinquishment of a pre-emption filing which was in full force and effect at the time of the grant to the railroad company serves to vest complete title in the railroad company as of the date of its grant.

Jamestown, etc., Co., vs. Jones, 7 N. D., 619.

Same case, 177 U. S., 125.

Bonner vs. Rio Grande Southern R. Co., 31 Colo., 446.

Alexander vs. Kansas City, etc., Co., 138 Mo., 464.

Hamilton vs. Spokane, etc., Co., 3 Idaho, 164.

In *Jamestown, etc., Co. vs. Jones, supra*, it appeared that at the date of the grant to the railroad company under the act of March 3, 1875, the lands in question were covered by the pre-emption declaratory statements of Sherman Jones and William S. King, which were uncancelled and in full force and effect (see 177 U. S., page 126). Notwithstanding this fact, it was held,

both by the state court and by the Supreme Court of the United States, that the existence of said pre-emption filings, which, as appeared, were abandoned subsequent to the grant to the railroad company, did not in any manner affect the railroad company's title to the right of way.

See, also,

Wagstaff vs. Collins, 97 Fed., 3 (C. C. A., 8th Cir.).

Norton vs. Evans, 82 Fed., 804 (C. C. A., 8th Cir.; opinion by BREWER, Circuit Justice).

Herbert vs. Brown, 65 Fed., 2.

Edwards vs. Begole, 121 Fed., 1 (C. C. A., 6th Cir.).

Moss vs. Dowman, 88 Fed., 181 (C. C. A., 8th Cir.).

Same case affirmed, 176 U. S., 413.

If this be the correct rule in reference to rights acquired by railroad companies under the act of March 3, 1875, *a fortiori* must it be the correct rule in reference to the right of way granted by the Pacific Railroad acts.

If, therefore, the decision in the *Harris case* be given the effect contended for by petitioners, the result would be that in the instant case petitioners would prevail, when, as a matter of fact, they are not entitled to recover, even though

the grant of right of way dates from the act of 1866, and not from the act of 1864.

(c) *Werling vs. Ingersoll, 181 U. S., 131, distinguished.*

The above-entitled case is cited at page 29 of the Supplemental Brief of Petitioners. It is apparently strongly relied upon. We submit that it has no application to the case at bar. Of the two acts of Congress there under consideration, the later was not amendatory of the earlier, nor did the two, taken together, constitute one body of legislation relative to a single subject. On the contrary, the later act was plainly exclusive of the earlier—was intended to, and did, obliterate it and take its place; and it was so expressly determined by this Court.

Exactly the contrary is true in respect to the Pacific Railroad Acts of 1862, 1864, and 1866, as we have hereinbefore demonstrated.

Moreover, the grant under consideration in the case cited was not a present, absolute grant, taking effect from the date of the act, but took effect only upon the fulfillment of certain conditions precedent, to-wit, the making of a survey and filing of a map. In this respect it resembled the general right of way act of March 3, 1875, and differed essentially both in language

and effect from the Pacific Railroad Acts. This Court itself in the *Werling case* points out the distinction, re-affirms its conclusions in respect to the Pacific Railroad Acts, and explains why they are not applicable to the act of Congress under consideration because of the difference in the language there employed by Congress (181 U. S., 138).

6. EVEN THOUGH PETITIONERS' CONTENTION BE SUSTAINED, THEY ARE NOT ENTITLED TO RECOVER, UNDER THE DOCTRINE ANNOUNCED BY THIS COURT IN ROBERTS VS. NORTHERN PACIFIC, 158 U. S., 1.

The railroad was constructed across the lands in question over forty years ago. It has been continuously operated there since that time. Appellants were not the owners of the land at the time of its original construction. Their title, if they have any, was acquired at or about the time of the commencement of this action. Under such circumstances appellants are entitled to no relief, either in equity or at law.

The one who was the owner at the time the railroad company took possession and constructed its line could not recover possession from the railroad company or question its right to possession. He might bring an action for

damages, if suit were commenced in apt time, but his grantees, who acquired the title long subsequent to the construction of the railroad, are deprived even of this right of action, which remains with the original owner, and does not pass by conveyance of the land.

Roberts vs. Northern Pacific, 158 U. S., 1.

Denver Co. vs. Doelz, 49 Colo., 48, 55, 56.

Penn Mutual Life Co. vs. Austin, 168 U. S., 685, at 698.

Northern Pacific R. Co. vs. Smith, 171 U. S., 260, at 271.

Texas & Pacific R. Co. vs. Scott, 77 Fed., 726 (C. C. A., 5th Cir.).

Northern Pacific vs. Murray, 87 Fed., 648 (C. C. A., 9th Cir.).

Maffet vs. Quine, 93 Fed., 347.

King vs. Southern Ry. Co., 119 Fed., 1017.

Louisville & Nashville R. Co. vs. Smith, 128 Fed., 1 (C. C. A.), 5th Cir.).

Fortune vs. Chesapeake & Ohio, 22 Ky. L., 749.

Buckwalter vs. A. T. & S. F. Ry. Co., 64 Kan., 403.

C. B. & Q. R. Co. vs. Englehart, 57 Neb., 444.

In *Roberts vs. Northern Pacific*, *supra*, the Supreme Court of the United States held, as stated in the syllabus:

> "Where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

This doctrine has recently been reaffirmed and applied to the right of way of the same line of railroad here involved.

Kindred vs. Union Pacific, 225 U. S., 582, 596, 597.

Petitioners make the suggestion that at the time of the construction of the railroad line across the lands here involved, one Adams was insane, but there is no proof in this record of that fact. Moreover, Adams never had the record title to the tract in question. At the time of the construction of the railroad the title stood in the

name of John W. Iliff. It had been conveyed to Iliff at the request of Adams so that Iliff might hold and dispose of the same for Adams' benefit. Iliff held the title for many years, and until the time of his death. After the death of Iliff, Adams obtained a decree establishing a trust as against the Iliff heirs, and in that case he avoided the defense of limitation upon the claim of insanity. All of these facts appear from the decision of the Supreme Court of Colorado relied upon by petitioners (*Warren vs. Adams*, 19 Colo., 515). We submit that none of these facts constitutes any defense to the claims of the railroad company in the case at bar.

FIFTH POINT.

Comments on the Act of Congress approved June 24, 1912, entitled "An Act Legalizing Certain Conveyances Heretofore Made by The Union Pacific Railroad Company."

The act of congress mentioned above is quoted at page 13 of petitioners' supplemental brief.

The part relied upon is there put in italics (page 14).

It is apparent that an attempt was made to model the act in question after the act of congress of April 28, 1904, relating to the Northern Pacific (33 Stats., 538), and doubtless the effort will be to induce the court to place thereon the construction given to the Northern Pacific act in the case of *Northern Pacific vs. Ely*, 197 U. S., 1. But, in that event, the petitioners would entirely overlook the fact that the Northern Pacific act, of April 28, 1904, contained the express provision "That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions." No such provision appears in the act now under consideration.

Had it not been for the provision of the act of April 28, 1904, hereinabove quoted, it would have been impossible for the Supreme Court to have sustained the validity of that act or to have given it the construction and effect evidenced by said decision.

The act of June 24, 1912, the title of which is set forth in the foregoing headline, contains three

sections. The first part of the first section thereof can have no bearing whatever upon the present controversy, because, by its express language, it relates solely to "conveyances or agreements heretofore made by the Union Pacific Railroad Company, etc.," and in the case at bar no contention has been made—and none is possible—that any such conveyance or agreement exists.

It will be observed that the portion of the act relied upon by petitioners is evidently intended to have a prospective, and not a retrospective, operation. Not only is the language subject to that construction, but no other reasonable construction is possible.

It is well settled that an act of Congress will not be construed as having a retrospective operation unless the language imperatively demands it. In *United States vs. Burr*, 159 U. S., 78, 82, it is said:

> "It is conceded that the general rule is, as stated in *United States vs. Heth*, 3 Cranch, 398, 413, that 'words in a statute ought not to have a retrospective application unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of

the legislature cannot be otherwise satisfied.' "

See, also, *United States vs. American Sugar Co.*, 202 U. S., 563, 577.

This is true even though the language employed be fairly subject to the other construction.

" Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

Twenty Per Cent. Cases, 20 Wall., 179, 187.

And the rule is always applied where the result of a retrospective operation would be to injuriously affect an existing status. This thought is expressed in *United States vs. Heth* (3 Cranch, 413), as follows:

" This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, service and remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation

but the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

But in the instant case, if the statute in question be given a retrospective operation, notwithstanding the clear import of its terms, the result would be to render it unconstitutional.

The title of the Union Pacific to its 400-foot right of way is a vested property right, as is its title to the odd-numbered sections of land, both being granted by the same acts of congress and by similar words of grant, operating, *in praesenti*. This has been held repeatedly, both in respect to the odd-numbered sections and in respect to the 400-foot right of way.

The title to the 400-foot right of way became vested in the grantee immediately upon the passage of the act of congress. It was subject to no conditions except those expressly named in the act. The title so received was such, and it was then, ever since has been and is now held upon such tenure, that no possession of any part of said right of way was or could be adverse, nor, however long continued, did or could serve to divest any right of the railway company therein, or to vest any such right in another, either at law or in equity; that no laches or acquiescence

on the part of the railroad company, however long continued, could or did in any manner affect its title to said right of way, or its right to use the same for railway purposes to its utmost limits, and that no estoppel, of whatever act or omission it might consist, or however long such acts or omissions might have continued, could possibly, or did, in any way operate to limit or affect the title of the railroad company in any degree.

In short, the title and the tenure were and are such that during the entire period of time from the original grant up to the present day none of the acts or omissions mentioned in the statute of June 24, 1912, could or did have the slightest effect upon the title of the railway company and its successors. That title remained and remains undiminished and unimpaired. These propositions are settled beyond the possibility of a doubt.

Northern Pacific vs. Townsend, 190 U. S., 267.

United States vs. Michigan, 190 U. S., 379, at 398.

Baltimore Co. vs. Baltimore, 195 U. S., 375, at 382.

Northern Pacific vs. Ely, 197 U. S., 1, 5.

Northern Pacific vs. Hasse, 197 U. S., 9.

Kindred vs. Union Pacific, 168 Fed., 652.

Kindred vs. Union Pacific, 225 U. S., 582, 597.

Union Pacific vs. Karges, 169 Fed., 459.

Stuart vs. Union Pacific, 178 Fed., 753.

If the statute in question be given a retrospective operation, past acts and omissions will thereby have a different legal effect, in respect to said right of way and the title thereto, than such acts and omissions could possibly have had at the respective dates when they occurred. In other words, by the operation of the statute so construed, property which is today vested in Union Pacific Railroad Company would, immediately upon the passage and approval of said act, and by virtue thereof alone, be taken from the Union Pacific and vested in others.

That congress has not the power to accomplish this without the consent of the present owner of the property would seem to be perfectly obvious, and the Supreme Court has expressly so held in respect of the very same acts of congress, concerning the Union Pacific Rail-

road Company, to which the statute in question is directed. In the *Sinking Fund Cases*, 99 U. S., 700, at 718, the Supreme Court, speaking through Chief Justice WAITE, said:

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. *No change can be made in the*

title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." [Italics ours.]

And in *United States vs. Union Pacific*, 160 U. S., page 1, the Supreme Court of the United States, speaking of the reserved right of congress to alter or amend the Union Pacific acts said at page 33. [Italics ours.]

> "It would not be competent for congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. *Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consumated.* We may here, not inappropriately, repeat what was said in the *Sinking Fund Cases*, 99 U. S., 700, 718, 719, 720, that 'this power has a limit,' and '*cannot be used to take away property already acquired under the operation of the charter*, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' Again, in the same case" [here follows the quotation from the *Sinking Fund Cases* hereinabove made].

See, also, *Wallbridge vs. Board of Commissioners*, 74 Kan., 34.

But the title to the right of way was a title acquired and a property right vested, not only "under the operation of the charter," but by virtue thereof, and by the very terms of the act of congress which constituted such charter.

Titles vested under such act of congress could not, without the consent of the grantee or its successor, be legislated back to the United States, or legislated into the ownership of anyone else; nor could the title or tenure created by the grant of said lands or right of way be changed, without such consent, by a subsequent act of congress.

This is the distinction between the act of June 24, 1912, and the act of April 28, 1904 (33 Stats., 538), referred to as a model and a precedent. This is the reason why the former act could be sustained, while the act of 1912 was not within the power of congress.

These are not new principles, nor are they applicable solely to the rights of the Union Pacific Railroad Company. As was said by the Supreme Court of the United States in *Farrington vs. Tennessee*, 95 U. S., 679, 683, "The doctrine of the sacredness of vested rights has its root deep

in the common law of England, whence so much of our own has been transplanted. KENT, then Chief Justice, said: It is a principle of that law, 'as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect.' "

And, as was said by the Supreme Court, speaking through Mr. Justice STORY, in *Wilkinson vs. Leland*, 2 Peters, 627, at 657:

> "In a government professing to regard the great rights of personal liberty and property and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed, that the great principles of *Magna Charta* were to be disregarded, or that the estates of its subjects were liable to be taken away, without trial, without notice, and without offence. * * * That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be sacred. * * * In *Terrett v. Taylor*, 9 Cranch, 43, it was held by this court, that a grant or title to lands, once made by the legislature, to any person or corporation, is

irrevocable, and cannot be re-assumed by subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

See also:

Dartmouth College vs. Woodward, 4 Wheat., 518.

Society vs. New Haven, 8 Wheat., 464.

The act of June 24, 1912, if given a retrospective operation, would confer upon acts and omissions occurring in the past a legal effect which they did not have at the time they occurred, and, by virtue of such restrospective operation, would transfer titles now vested in the Union Pacific Railroad Company to others not now invested. Acts and omissions occurring in the past—and which

the Union Pacific and its predecessors, as the law then stood, were under no obligation to prevent or avoid, but could safely ignore,—by the retrospective operation of the new statute, would be given a different legal effect of such immediate potency that the railroad company would be at once deprived of its property.

Similar attempts by statute to accomplish similar results by like methods have been universally condemned. As was said in an early case by the Supreme Court of Maine, such a statute is unconstitutional and cannot be carried into effect, because it "would impair and destroy vested rights, and deprive the owners of real estate of their titles thereto, by changing the principles and the nature of those facts by means of which those titles had existed and been preserved to them in safety."

Proprietors vs. Laboree, 2 Greenleaf (Me.), 275, 295.

The foregoing case was approved and a similar ruling made by the Supreme Court of the United States, in *Webster vs. Cooper*, 14 How., 488, 502, 503.

Speaking of an attempt to change a statute relating to adverse possession, and to give such

change a retroactive effect, it was held in an early case that:

> "It is clearly not within the scope of the legislative power, to give to a law the effect of taking from one man his property and giving it to another, by any new rule of tenure, retroactive in its character. Therefore, the legislature could not say, by a retroactive act, that the mere possession of a *tort feasor*, without actual enclosures, could divest the real owner of his title, and the reason is, that the law having been different, the real owner relied upon it as his protection, and took no steps, as he might otherwise have done, to defeat a result which could not have been foreseen under the law, as it stood previous to the new rule. If a party should permit another to occupy his land by enclosures, under an adverse claim, for more than twenty years, his title is gone. This results, because the law announces, that every man holds his land subject to have his title defeated in the manner indicated, and if he does not guard against such a contingency it is his own fault. On the other hand, the law has been, previous to the act of 1852, that occupation of land by a wrongdoer, without enclosure, would have no effect upon the title of the real owner, and hence the law im-

posed upon the latter no obligation to defeat such wrongful possession in order to protect his rights, as it did in the case of possession accompanied by enclosures. Hence, as we have said, it was not in the power of the legislature to change this rule of law, so far as to give it a retrospective operation, because it would virtually be taking the land of one man, held by a good legal title, and giving it to another, who the law has said had none."

Thistle vs. Frostburg, 10 Md., 129, 144–5.

Such manifestly unjust and improper legislative measures have seldom been attempted. Every such attempt has promptly been rebuked by the courts.

The courts universally condemn enactments in the nature of limitation statutes, or statutes relative to adverse possession, which, by retrospective operation, purport to bar existing rights of action not barred by the prior existing law, or to create titles by previous adverse possession not created by the prior existing law.

Of such a statute the Supreme Court, in *Wilson vs. Iseminger*, 185 U. S., 55, at 62, says that "it would not be a statute of limitation, but an unlawful attempt to extinguish rights arbitrarily

whatever might by the purport of its provisions."

And in *Price vs. Hopkins*, 13 Mich., 318, 324, Judge COOLEY says of such a statute, that it "cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." And this eminent jurist uses the same language in reference to this subject in his work on Constitutional Limitations (7th Ed.), page 523.

See, also,

Terry vs. Anderson, 95 U. S., 628.

Koshkonong vs. Burton, 104 U. S., 668, 675.

Wheeler vs. Jackson, 137 U. S., 245, 256.

A further citation of authorities upon a proposition so universally conceded and upheld is quite unnecessary.

When we consider that the present Union Pacific Railroad Company acquired its title to the right of way and otner property of the former railroad companies, grantees in the acts of congress, by the recent foreclosure of mortgages, originating many years ago, at the inception of the enterprise, including the foreclosure of the lien of the

United States imposed by the very acts in question, an additional and conclusive reason against the validity of the statute in question at once appears (Record, page 18, also page 117). The present Union Pacific Railroad Company stands in the shoes of the mortgagee. Its title was acquired by virtue of the foreclosures occurring in 1898, and thereby all rights, or alleged rights, based upon acts or omissions of the mortgagor between the date of the mortgage and the date of the foreclosure were wiped out. The rights of the purchaser at the foreclosure sale are precisely those of the mortgagee, and, like his, relate back to the mortgage.

Secor vs. Singleton, 41 Fed., 725, 728.

Osterberg vs. Union Trust Co., 93 U. S., 424.

Jones on Mortgages, Vol. 2, Sec. 1654.

De Haven vs. Landell, 31 Pa. Sta., 120.

Gamble vs. How., 40 Mich., 561.

Davis vs. Life Ins. Co., 84 Ill., 508.

Heirs vs. Simpson, 4 Mo., 319.

Ritger vs. Parker, 8 Cush., 145, 149.

Rector, &c., vs. Mack, 93 N. Y., 488.

We therefore respectfully submit that the act of June 24, 1912, has no application to the case at bar, for the reason that it operates prospectively only, was enacted long after all the transactions involved herein, subsequent to the decision of the Circuit Court of Appeals, and while this case was pending in this Court. But even if, by its language, it imperatively demanded a construction giving it a retrospective operation, then the act would be unconstitutional and beyond the power of congress to enact.

SIXTH POINT.

The decree of the court below should be affirmed.

C. C. DORSEY,
Of Counsel for Respondent and
Appellee.

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Supreme Court

OF THE

UNITED STATES

October Term, 1912.

No. 135

THOMAS B. STUART and
CHARLES A. MURRAY,
Petitioners and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY.

A Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE, AND BRIEF AND ARGUMENT OF AMICUS CURIAE.

Comes now Joseph C. Ewing, Esq., an attorney and counselor at law of Greeley, Colorado, and a member of the bar of the Supreme Court of the United States, and asks leave of this Honorable Court to appear as amicus curiæ for the purpose of making friendly suggestions to

the Court in the case at bar touching important public interests in the State of Colorado, involved in the construction of the Acts of Congress of July 1, 1862, July 2, 1864, July 3, 1866, March 3, 1869, and June 24, 1912, now under consideration by the Court.

In asking leave to file the following brief and argument as amicus curiæ in the instant case, the writer wishes to submit the following affidavit, to-wit:

STATE OF COLORADO, |
ss.
COUNTY OF WELD, |

Joseph C. Ewing, of lawful age, being first duly sworn according to law, deposes and says:

That he is an attorney and counselor at law, residing in Greeley, Colorado, admited to practice in the Supreme Court and state courts of Colorado, Federal District Court of Colorado, and United States Circuit Court of Appeals for the Eighth District. That he has practiced law continuously for more than nine years in Greeley, Colorado, having been admitted to the Supreme Court of Colorado September 9, 1903.

That he is now and for several years last past has been the City Attorney of the City of Greeley, Colorado. That a case is now pending in this Court, No. 490, October Term, 1912, entitled Union Pacific Railroad Company appellant, vs. City of Greeley, et al., appellees. That this cause involves a construction of the five acts of congress above named. That, as shown by the record in that case, important, vital and valuable property interests are involved, worth upward of a quarter of a million of dollars,

That in addition thereto the right, title and control of said City of Greeley to approximately twenty important streets and avenues, together with the sewers, water mains, irrigation ditches, siphons, fire alarm lines, and various other underground, surface and overhead utilities, now laid and strung under, over and above said alleged four hundred foot right of way, are involved.

That the construction of said foregoing acts of congress involve a shaking and disturbance of titles unprecedented in the history of the commonwealth of Colorado.

That leave to appear as amicus curiæ would have been asked earlier, but the City Council of said City of Greeley did not become aware of the many common points of interest in the instant case No. 135 with their case No. 490, in this Court, and especially with the fact that a vigorous attack had been made by appellee railroad company in this case upon the Act of Congress approved June 24, 1912, legalizing certain conveyances, until Saturday, January 4, 1913. That the subject was brought to the attention of the Mayor of said City Council and the Mayor of the City of Greeley at that time, which was immediately after deponent had read the fifth point in the brief for respondent and appellee filed in the instant case.

That immediately said Mayor called a special meeting of said City Council wherein the affiant was instructed to appear in Washington, D. C., before Your Honors, briefly to state the situation, and ask leave of the Court to file a brief and argument as amicus curiæ.

That the City of Greeley is a city of about ten thousand inhabitants. That not only is the municipality

vitally concerned in the issues of the case at bar, but this is true in respect to almost every Greeley resident, and to the community for many miles both north and south of said city.

That said Act of Congress, approved June 24, 1912, was largely the result of the struggle of citizens of the City of Greeley and community and of The Valley Farmers Protective Association of Nebraska, composed of farmers residing along the railroad right of way from the eastern to the western boundary of said state. That their purpose was to relieve themselves of the calamitous situation with respect to the titles to their farms and other real estate, all estimated to be worth several millions of dollars.

That affiant has worked incessantly since receiving said instructions to prepare this brief and argument in ample time to serve copies on all attorneys appearing of record in this case. That, at the time of making this affidavit, affiant's work has progressed to such stage that it appears that he will be able to serve all attorneys in this case at least seven days before the instant cause is argued orally before Your Honors, and that said service may be made two or three weeks before said case is heard.

Further affiant saith not.

Subscribed and sworn to before me this 14th day of January, A. D. 1913.

My commission expires January 22, 1914

Notary Public.

WHEREFORE, Upon the foregoing showing, undersigned counsel respectfully asks leave of Your Honors to make the following suggestions and argument in this cause as amicus curiæ.

JOSEPH C. EWING.

GREELEY CASE NOT ARGUED. REFERENCES TO SAME JUSTIFYING APPEARANCE AND CONTENTIONS IN INSTANT CASE.

We assure the Court that we do not desire to argue the Greeley case. However, we think it important to give as briefly as possible the facts of the Greeley case. Also that we make certain references to it in the course of our argument, to indicate to Your Honors the reasons for our appearing here amicus curiæ to make suggestions to the Court and to argue the questions of the construction of the various Acts of Congress, and especially the Act of June 24, 1912.

BRIEF STATEMENT OF THE FACTS IN THE GREELEY CASE, No. 490, SUPREME COURT OF THE UNITED STATES.

In order to show the Court our interest in the construction of the congressional acts involved in the case at bar, it is advisable to call Your Honors' attention to a somewhat short statement of the facts in the Greeley case.

It is not necessary to repeat here the rights granted to theUnion Pacific Railroad Company and The Leavenworth, Pawnee and Western Railroad Company and

their successors by the acts of congress, July 1, 1862, July 2, 1864, July 3, 1866, and March 3, 1869.

After the Act of 1866 had provided for a connection of the Pawnee line, afterwards changed to Union Pacific Railroad Company, eastern division, with the main line of the Union Pacific Company at a point not more than fifty miles westwardly from the meridian of Denver, Colorado, a local line from Denver to Cheyenne was incorporated.

This line, known as The Denver Pacific Railway and Telegraph Company, was incorporated in 1867 under the laws of Colorado. The City of Greeley is about midway on this line between Denver and Cheyenne. On March 3, 1869, this company located and graded a line from Denver to a connection with the main line of the Union Pacific at Cheyenne, Wyoming. Congress authorized the Union Pacific, eastern division, by the act of 1869, to take over the Denver and Pacific Company's line from Denver to Cheyenne and to mortgage the same for $32,000.00 per mile.

The Union Pacific, after the passage of the act of 1866, filed a map, which was the second, showing the general route to Denver, thence northerly along the South Platte River to the Cache la Poudre River, thence westwardly to a point near Fort Collins, Colorado. Fort Collins is about twenty-four miles northwest of Greeley, and some twenty miles west of the north and south line between Denver and Cheyenne above described. In other words, the Denver to Cheyenne line taken over under the act of 1869 did not follow the line marked on the map of general route filed in 1866, but criss-crossed it,

being in place[illegible]uch as twenty miles from the Denver to Cheyenne l[illegible] as finally constructed.

On August 10, 1869, said Denver and Pacific Railway and Telegraph Company executed on its lands and right of way a mortgage to secure bonds in the sum of $2,500,000.00 The trustees named in the mortgage were given full power to make conveyances of any of the mortgaged property upon request of the Denver Pacific Company.

Pursuant to said authority, John Evans, as trustee, on April 13, 1870, conveyed to Horace Greeley, as trustee, and some others, in trust for what was known afterwards as Union Colony, Section 17 and a portion of Section 5, which included a part of the lands involved in the Greeley suit. In this deed the railroad company reserved as a right of way a strip of ground 200 feet in width.

In 1870 a committee representing an association of pioneers, who desired to settle in the Territory of Colorado, selected the present site of Greeley for such a settlement, afterwards incorporated and known as The Union Colony of Colorado.

Immediately upon incorporation, The Union Colony acquired by deeds from the respective entrymen and patentees the title to the lands on which the greater part of the City of Greeley is now located. None of the deeds of said Union Colony contained reservations of any character of any right of way for said Denver Pacific Railway and Telegraph Company or any other company, except the tract conveyed by the said trustee, John Evans. The railroad had constructed its road over the land prior

to acquisition of title by said Union Colony, but not before predecessors of Union Colony had acquired title.

After acquiring said titles, and prior to August 23, 1870, the Union Colony surveyed and platted into blocks, lots, streets, alleys and avenues the town, now city, of Greeley, and filed said plat with the County Recorder of Weld County, Colorado, about the same time.

After filing said plat said Union Colony, on October 21, 1870, made, executed and delivered to said Denver Pacific Railway and Telegraph Company a right of way deed to fifty feet on each side of the center line or track as then constructed through the Town of Greeley, the entire width of said right of way being 100 feet through the town running north and south and through various blocks as platted, except in two blocks near the center of the town where the right of way was made a total of 200 feet wide for use of the railroad company for depot grounds and depot purposes. In consideration of said deed, the railway company agreed to erect within three months a substantial freight and passenger depot. The Union Colony also agreed to lay out a sixty-six foot street on the east of the right of way.

The Union Pacific Railway Company, eastern division, changed its name to Kansas Pacific Railway Company after the act of 1869. In January, 1880, the Union Pacific Railroad Company, main line, the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, consolidated as the Union Pacific Railway Company. The new company acquired all the rights of the three companies.

Thereafter said Union Pacific Railway Company purchased portions of lots, lying within the now claimed 400 feet right of way, from the grantees of the said Union Colony, paying valuable considerations therefor. The dates of some of the specific purchases are March 3, 1886, and March 15, 1886. On August 11, 1900, the appellee in this case, Union Pacific Railroad Company purchased similar lots. On October 25, 1901, the last named company made other purchases of land within said 400 foot right of way.

All of these deeds were recorded by said Union Pacific Railway Company and Union Pacific Railroad Company respectively, and for the first time said railway companies went into actual possession of said lots and lands.

The Union Pacific Railroad Company, and its predecessors in title, at various times, desiring to construct and operate tracks upon certain streets, avenues, alleys and public places in the City of Greeley, within the now claimed 400 foot right of way, applied to the board of trustees of the town of Greeley, and later of the City of Greeley, for the privilege of doing so. These town and city boards, under the laws of Colorado, enacted ordinances to that end. The Union Pacific Railroad Company and its predecessors accepted the ordinances and grants and constructed, maintained and operated, and now maintains and operates, the tracks so authorized by said ordinances upon said now claimed 400 foot right of way.

That the ordinances are as follows:

Ordinance No. 50, approved March 16, 1886, to U. P. Ry. Co.

Ordinance No. 102, approved September 17, 1901, to U. P. R. R. Co.

Ordinance No. 104, approved December 5, 1901, to U. P. R. R. Co.

Ordinance No. 107, approved May 20, 1902, to U. P. R. R. Co.

Ordinance No. 111, approved December 2, 1902, to U. P. R. R. Co.

Ordinance No. 191, approved June 15, 1909, to U. P. R. R. Co.

Said Union Pacific Railroad Company in order to secure Ordinance No. 191 procured and filed with the City Council of Greeley the written consent of the owners of land representing a majority of the frontage of the streets sought to be used for railroad purposes under said ordinance. All persons signing such consent were grantees of and claimed title as the owners of lots fronting on said street through said Union Colony and were within the now claimed 400 foot right of way.

The Union Colony, immediately after filing the town plat of 1870, sold and continued to sell lots and lands, except streets, avenues and alleys, on the plat, including all of the lots, blocks, and parcels of land abutting upon the lines drawn fifty feet distant from and parallel to and on either side of the center line of the track of the Denver Pacific Railway and Telegraph Company except in the two blocks where the right of way was 200 feet wide.

Prior to 1874 said Union Colony had conveyed by deeds with no exceptions or references to any reserved

railroad right of way practically all of said lots abutting upon said 100 feet right of way.

Prior to 1880 said Union Colony had sold and conveyed all of said lands including the lands now claimed by various parties lying within the claimed 400 foot strip, but outside of the 100 foot strip. The conveyances were in fee simple for valuable considerations to large numbers of persons and were recorded.

The purchasers immediately entered into the actual and exclusive possession of these lands, and thereafter from time to time, for valuable considerations, deeded them, mortgaged them, and otherwise dealt with them as their own, none of the instruments of conveyance containing any reservations of right of way to the Denver Pacific Railway and Telegraph Company or its successors.

Within the now claimed 400 foot strip, but outside of the 100 foot strip, these grantees of Union Colony, and their successors, made deeds and mortgages on their lands, constructed valuable buildings, consisting of dwellings, warehouses, factories, mills and the like, and thus dealt with them as their own property, considered to be in fee simple, for thirty or forty years.

That the improvements on these lands are very valuable, being worth in the aggregate at least $250,000.00.

Fences were erected on the 100 foot right of way line by the purchasers of these properties. The Denver Pacific Railway and Telegraph Company also from time to time erected and maintained its own fences along the same lines. These fences were erected thirty or forty years ago and still remain on the line. The railroad company never occupied or pretended to occupy any of the lands

outside of the 100 foot strip, except the 200 foot strip for depot grounds aforesaid.

That the Union Colony, Town of Greeley and City of Greeley, since 1870 in succession have respectively granted privileges to various parties to construct telegraph, telephone, electric light and power lines, to lay gas mains and pipes, over, under and along the various streets and alleys crossing and lying within said claimed 400 foot strip; also railway tracks, sewer lines, water mains, irrigation ditches, siphons, fire alarm lines, pipes and conduits of various kinds, have been constructed through and over said 400 foot strip. That many of said privileges and utilities existed for more than twenty-one years prior to the beginning of the said Greeley suit by the Union Pacific Railroad Company. That said things were done without protest from said company.

That in January 1881, another railroad company, The Greeley, Salt Lake and Pacific Railway Company, under the control and ownership of the Union Pacific Company, acquired titles by purchase and condemnation of its right of way through the City of Greeley, which right of way was upon the now claimed 400 foot strip, but outside of fifty feet from the center of the Union Pacific main track. That later, through foreclosure proceedings, said Greeley and Salt Lake Company became the property of the Colorado & Southern Railway Company, which is not now in any manner controlled or owned by the Union Pacific Railroad Comapny, but occupies the old original right of way. In the year 1908 the Greeley and Denver Railway company, an electric road, the Denver, Laramie and Northwestern Railroad Company, a new steam road,

and the Chicago, Burlington & Quincy Railroad Company, expended large sums of money buying such portions, as they needed to come into Greeley, of the lots and lands thus occupied, conveyed and reconveyed for more than forty years, inside of the 400 strip, but outside of the 100 foot right of way.

That soon after these occurrences, the Union Pacific Railroad Company, in other portions of the city, began to encroach upon and build tracks over and across the public streets and avenues of the City of Greeley, within the now claimed 400 foot strip but outside of the 100 foot right of way without any ordinance or permit of any kind therefor. That when the Mayor and City Council of said city protested against the tearing up of its streets and municipal utilities outside of said 100 foot right of way, the Union Pacific Railroad Company began an injunction suit against the City of Greeley and its officers in the United States District Court for the District of Colorado, at Denver, Colorado.

That thereafter, within a short period, the various railroad companies intervened or otherwise became parties to this Greeley suit. The cause was tried before District Judge Lewis in Denver, Colorado, and resulted favorably to the City of Greeley. The Union Pacific Company then appealed the same to the United States Circuit Court of Appeals for the Eighth Circuit. The cause was heard and determined at St. Louis, Missouri, and the judgment of the United States District Court of Colorado was affirmed.

However, in the opinion affirming the judgment, as we have suggested elsewhere in this brief, we think the

Court did not fully comprehend and did not fully protect the rights of the City of Greeley and its citizens. Thereafter, the Union Pacific Company appealed said cause from the United States Circuit Court of Appeals, Eighth Circuit, to this Honorable Court for final adjudication and determination.

While there are some points of difference between the Stuart case at bar and the Greeley case, I believe Your Honors will note the very many similar features and that it is possible, at least from the writer's point of view, that Your Honors in determining the instant case may construe the law in such wise as to set at rest forever the issues in the Greeley case.

CITY OF GREELEY AND ITS CITIZENS SO FAR HAVE BEEN BUFFERS FOR THE RAILROADS.

Case No. 490, October Term, 1912, in this Court, Union Pacific Railroad Company vs. City of Greeley, et al., was originally begun by the railroad company against the city. Thereafter in succession, five different railroad companies intervened or otherwise came into the Greeley case. Since that time we may fairly complain that Greeley and its citizens have been buffers for the various contesting railroad companies.

We respectfully urge that the City of Greeley, trustee of the streets and of the underlying, surface and overhead municipal utilities and its numerous citizens with their titles overthrown after forty years peaceable possession, are the innocent sufferers from the eleventh hour contention, so far as this community is concerned, of the

Union Pacific Railroad Company claiming a swath four hundred feet wide through the heart of the city. The city and its inhabitants are also the innocent victims of the expense and perturbation caused by these right of way suits.

Thus far we feel that we have not fared as well at the hands of the Circuit Court of Appeals as we should. We do not criticise the Court in this respect. Rather we have reproved ourselves for failing, on account of the great expense of the litigation, more aggressively to press our particular rights as a municipality as against the Union Pacific and all other railroads.

We appeared on the briefs in the Circuit Court of Appeals, but I fear we did not impress the Court that we were greatly interested. We are convinced of this fact by the statement of His Honor Judge Reed, found at 189 Fed. p. 25, as follows:

> "As I understand the record, the City of Greeley *only* is interested in that portion of the appellant's right of way over this section and *only* for the use of its streets Nos. 20 to 23 inclusive, in the south part of the city where they cross the same."

We are interested in twenty important streets running from near the north part of the city to its south boundaries from Fourth Street to Twenty-third Street inclusive. These are east and west streets crossing the Union Pacific. Then add Sixth Avenue and Seventh Avenue, two important north and south streets crisscrossed by the Union Pacific and other railroads.

We are interested in other matters of vital importance but we mention the streets and avenues here to show how we failed to convince the Circuit Court of Appeals that we were interested.

It is true that said Court did cite Northern Pacific Railroad vs. Townsend, 190 U. S. 267-272, as authority for their statement that the city has a right to lay its streets across the right of way and use them as public streets.

However, we think the Court failed to understand that the Union Pacific Railroad Company *now* claims we can cross only with its special permission; that the said railroad company desires to close many of our important streets; that it *now* desires the city every time it wishes to lay a sewer, water main or other municipal utility under, across or over said right of way, to secure with much delay and expense a lease or contract with most stringent provisions in favor of the railroad company.

That the railroad company makes these contentions in the face of the fact that they have only an easement for railroad purposes to a right of way 100 feet wide by virtue of the terms of the deed under which they hold. The predecessor in title of this same railroad company accepted said deed. That said railroad company does not stop with such claims for a hundred foot right of way, but claims a 400 foot swath straight through the heart of the city. It has not used or pretended to use the now claimed 400 foot strip outside of the 100 foot right of way and a small space of 200 feet in two blocks for its depot and grounds, for forty years.

There has been an awakening since the Circuit Court of Appeals decision. Especially is it apparent to the City of Greeley and its residents that case No. 490 presents no unselfish grapple of giants insofar as the city is concerned. That in the contest Greeley may be trampled unless it asserts its rights vigorously.

We are forced to contest more ardently, since we recently learned that the Union Pacific Railroad Company, by its "Fifth Point" in its brief (pp. 124 Appellee's brief) in the instant case, has attacked the constitutionality of the Act of Congress approved June 24, 1912, legalizing conveyances made by said railroad itself.

Innocently enough, since the passage of said Congressional Act of 1912, the City of Greeley and its hundreds of citizens affected by said 400 foot right of way contentions had enjoyed in their own minds the sweet assurance that their streets and municipal utilities and private properties would not again be encroached upon. That titles were once again perfect and at rest; that loans might be made on property within the disputed strip and that property might again be bought and sold in safety as had been the case for the past forty years.

Your Honors may imagine the startled minds of the people of this little city of 10,000 inhabitants when they learned that streets and titles were not safe and at rest; that conditions were perhaps more chaotic than ever; that the Union Pacific Railroad Company was contending that Congress could not pass an act declaring legal the very things which the great railroad company had itself done. That it was contrary to the Constitution of the United States for Congress to legalize and

make effective beyond quibble the very deeds and various other instruments of conveyance that the Union Pacific itself and its predecessors had executed and delivered for valuable considerations to various persons, for more than forty years.

Such an unconscionable and inequitable proposition causes even the quiet and peaceable little City of Greeley to arise to a more aggressive defense of its rights.

If your Honors please, that is one of the reasons why we are here asking to make suggestions to the Court as *amicus curiæ*. We do not wish to charge ourselves with sleeping on our rights any longer.

All of the five Acts of Congress, including said Act of June 24, 1912, legalizing conveyances, are now before your Honors for consideration. It is likely that the construction that you will place upon said Acts in deciding the case at bar will control the Greeley case. Therefore it seems to us not only wise but most fitting that we appear here to advise the Court in a friendly manner and call the Court's attention formally to the important case following, known as the "Greeley case" being No. 490 in this Court and entitled Union Pacific Railroad Company vs. City of Greeley, et al.

ACT OF CONGRESS, JUNE 24, 1912, LEGALIZING CONVEYANCES, IS CONSTITUTIONAL. ALL TITLES SECURED THROUGH CONVEYANCES OR AGREEMENTS FROM THE RAILROAD, BY ADVERSE POSSESSION OR THROUGH ABANDONMENT ARE LEGALIZED AND VALIDATED.

This remedial act of Congress is short. We set it

forth in full. It clearly legalizes titles acquired in three distinct ways.

1st. Legalizes *conveyances or agreements* made by the railroad company.

2nd. Legalizes titles on strip acquired by *adverse possession.*

3rd. Legalizes titles to abutting owner by *abandonment* of right of way by the railroad.

The Act of June 24, 1912, is as follows:

(Public—No. 200.)
(H. R. 16689.)

An Act Legalizing certain conveyances heretofore made by the Union Pacific Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all conveyances or agreements heretofore made by the Union Pacific Railroad Company, or the Union Pacific Railway Company, or Union Pacific Railroad Company, or the Leavenworth, Pawnee and Western Railroad Company, or the Union Pacific Railway Company, Eastern Division, or the Kansas Pacific Railway Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way of the Union Pacific Railroad Company granted by the Government by the Act of Congress on July 1st, eighteen hundred and sixty-two, entitled "An Act to aid the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other

purposes"; and also all conveyances or agreements heretofore made by the Union Pacific Railroad Company, or the Union Pacific Railway Company, or the Denver Pacific Railway and Telegraph Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way between Denver, Colorado, and Cheyenne, Wyoming, of any of said companies granted by or held under any Act of Congress, and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee-simple title.

That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation, or either of them, or the successors or assigns of any of them,by or through adverse possesion of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United Statee absolutely or in fee instead of being granted as a right of way.

Sec. 2. That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way is hereby granted to the owner of the land abutting thereon.

Sec. 3. That nothing hereinbefore contained shall have the effect to diminish said right of way to a less width than fifty feet on each side of the center of the main

track of the railroad as now established and maintained; *Provided,* That nothing herein contained shall be taken or construed to be a recognition of any right in the Union Pacific Railway Company as successor in interest to the Union Pacific Railroad Company.

Approved, June 24, 1912.

This act is simple enough. It naturally falls, as to validity of titles, under three subdivisions as above set forth. Note the following language on conveyances and agreements:

> "And all *conveyances or agreements* confining the limits of said right of way or restricting the same are hereby legalized, validated and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee simple title."

Note the language as to adverse possession:

> "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation or either of them or the successor or assigns of any of them by or through *adverse possesion* of the character and duration prescribed by the laws of the state in which the land is situated, such *adverse possession* shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely, or in fee, instead of being granted as a right of way."

Note the language as to abandonment:

> "That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, *abandoned as a right of way,* is hereby granted to the owner of the land abutting thereon."

CONGRESS IN THIS ACT IS DOING WHAT IT RESERVED THE RIGHT TO DO.

It seems to be the contention of appellee that Congress had no power or right to pass this act except for prospective purposes. In making this statement, the railroad company must forget that congress reserved to itself this power in the very act itself in 1862. It has not waived it, and the appellee's title is subject to this reserved power. Congress is taking nothing from the railroad in this respect, because Congress did not originally grant to the railroad unconditionally, but reserved to itself and excepted out of said grant a right at any time to add to, alter, amend or repeal the act. Note the following language from the Act of 1862.

> "And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said road and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military and other purposes, *Congres may, at any time, having due regard for the rights of said companies*

named herein, add to, alter, amend or repeal this Act."

CONGRESS HAS HAD DUE REGARD FOR THE RIGHTS OF THE RAILROAD COMPANY.

One condition Congress placed upon itself in making amendments, and that was that in doing so it should have due regard for the rights of the companies. In this respect we say that it is clear that Congress has done nothing in the remedial act of 1912 which the railroad company has not itself done. Apellee ought not to complain when Congress validates and legalizes beyond contention the very acts and doings of the railroad company itself. Appellee has made conveyances and agreements affecting its right of way. Doubtless when it made them it intended them to be valid, otherwise it would admit instantly that it was attempting to defraud the grantees. Is it either equitable or legal that the railroad company should now complain that Congress has prevented it from committing a fraud and from now contending that what it did voluntarily and in good faith originally, was in fact a fraud and legally null and void.

Again Congress validates titles by adverse possession. How can the appellee company complain about this? The theory upon which titles to adverse possession have not been permitted on the rights of way by this Court is that the railroad had an important public duty to perform and that the government itself had a special isterest in the railroad and the right of way for postal, military and other purposes, and particularly so in the time of war. The public purposes and services which the

railroad must render are protected. There is nothing in this Act which hinders or obstructs the rendering of that public service. The third section of the Act expressly provides that nothing shall have the effect of diminishing the right of way to less than fifty feet on each side of the center line of the railroad as now estabilshed and maintained. Considering that twelve feet is necessary for one track, the railroad company could lay on this 100 foot right of way more than eight parallel tracks. And we respectfully suggest that it is a patent fact that with a 100 foot right of way the railroad company could easily lay ten or twelve parallel tracks. It would appear that Congress has protected the railroad in all the future requirements of the public service for all time.

Congress has thus had due regard for the rights of the railroad, and when it has protected the railroad the government has protected itself in its postal, military and other purposes. With the railroad and the government both protected as to the use of the right of way for railroad and governmental purposes, what complaint can the railroad make that the government has seen fit to relinquish its rights to other persons which it reserved to itself in the original Act. I will call your Honors' attention later to the authorities, doubtless familiar to you, as to the reservations of rights in the government and the *implied reverter* in the original Act.

Where the railroad company has abandoned its right or way, it ought not to complain that Congress grants the abandoned land to other persons. The original grant gave the 400 feet to the railroad company for railroad purpose. When it has ceased to use or has never used said

land for railroad purposes, the implied reverter in the government takes effect. This land then belongs to the government to do with it as it deems wise from the point of view of public policy. These abandoned lands under the very terms of the original Act, and as it has been construed by this Honorable Court, belong to the government.

We respectfully submit that Congress is not granting away the railroad rights. Congress is granting its own rights. It is granting the reversions which belong to it under the parent Act.

NORTHERN PACIFIC RAILWAY COMPANY v. ELY, *197 U. S. 1, 3, 4, 5, 6, 7, 8, and 9.*

NORTHERN PACIFIC RAILWAY COMPANY v. HASSE, *197 U. S. 9, 10.*

This Ely case, *supra*, decided in this Honorable Court in the October Term, 1904, is absolutely decisive of all questions with reference to the validity and constitutionality of the Act of June 24, 1912. Appellee as well as ourselves must assume that your Honors will be guided by the doctrine announced in the Ely and Hasse cases.

Chief Justice White, then Associate Justice, in the important case of Northern Pacific Railway Company v. Townsend, 190 U. S. 267-271, clearly reaches the kernel of the nature of the grant, the *limitation of the fee* and the *implied condition of reverter* in the government. As Chief Justice Fuller quoted this particular portion of Chief Justice White's opinion in the Ely case, we will set it forth here:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, *the grant was explicitly stated to be for a designated purpose,* one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. *In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.* * * * Congress having plainly manifested its intention that the title to and possesion of the right of way should continue in the original grantee, its successors and assigns, *so long as the railroad was maintained,* the possession by individuals of portions of the right of way cannot be treated without overthrowing the Act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

This language (and we have used italics to show the portions which especially appealed to us) more clearly describes the nature of the railroad title in the right of way than we could possibly describe it. The fact that the

grant was expressly stated to be for (a) *a designated purpose*—railroad purposes; that (b) the grant was in effect a *limited fee*; that the grant was made (c) on an *implied condition of reverter* in the event that the company *ceased to use or retain* the land *for the purpose for which it was granted*, leaves no vested rights in the railroad company in these respects when they themselves have brought about the contingencies either voluntarily or involuntarily which make the conditions subsequent effective.

That Titles Acquired by Private Individuals Upon a Congressional Railroad Right of Way May Be Validated by an Act of Congress, Is Now at Rest.

This subject seems hardly open to debate. In speaking of the titles acquired by adverse possession by the Washington claimants before the remedial Act was passed on April 28, 1904, confirming them, Chief Justice Fuller said in the Ely case, 197 U. S., 8:

> "So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, *had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the Act of April 28, 1904, operated to confirm. The Act is remedial and to be construed accordingly.* The lots of some of the defendants were outside of the two hundred feet.

The lots of others were partly within and partly without the strip. But the Act was passed after the judgment of the Supreme Court was rendered and while the case was pending here, and it must be left to the state courts to deal with the matter in the light of the conclusions at which we have arrived."

PRESENT CONTROVERSY OVER STUART AND MURRAY LANDS DEFINITELY INVOLVES THE TWO SUBDIVISIONS OF ACT OF 1912 VALIDATING TITLES ACQUIRED BY "ADVERSE POSSESSION" AND "ABANDONMENT."

Counsel for appellant here claim that the Union Pacific never has had and does not now have *any* right of way through their land. We are disposed to agree with them in this contention. However your Honors may decide the contention that there is no right of way at all, it seems to us that the Act of 1912 and the foregoing cases are completely decisive that the railroad company has in no event more than a one hundred foot right of way through this land.

It is not necessary further to lengthen this brief by again setting forth here the evidence, summaries and arguments running through all the briefs showing, in our opinions, clearly under the law of the State of Colorado and judicial decisions, an adverse possession by appellants of all of the claimed 400 foot right of way outside of that actually used and the 100 feet expressly reserved by Congress in the Act of 1912. The fact is that the rail-

road company for nearly forty-five years has permitted claimants and their predecessors to believe that they had title. Claimants have done those things with respect to the land which, under the decisions in the books elsewhere in this brief set out and in appellants' briefs, are amply sufficient to show and create a title by adverse possession, when coupled with the remedial Act passed in June, 1912.

Again, for almost forty-five years, the railroad company has abandoned all of its right of way except about twelve feet actually occupied by its track and embankments. Soon after the beginning of this suit it fenced fifty feet on either side of the right of way. This is sufficient acknowledgment in itself that Congress in June, 1912, was right in exercising its amending power and determining that the last forty-five years had shown that one hundred feet is amply sufficient for the railroad.

In other words, they put in writing and made effective by a congressional Act the very fact which the railroad company itself had by its existence and operation for forty years shown to be the truth. The railroad company really determined conclusively that 100 feet in this land is sufficient for a right of way. Having thus done so, the remainder of the right of way reverted to the government under the terms of the Act and your Honors' decision in the Ely case.

The government then, by the Act of 1912, disposed of this property which had reverted to it as it might do as the owner thereof. Thus the railroad company as a matter of fact having abandoned the use of not less than three hundred feet of said right of way, and the

same having reverted to the United States, the United States has very properly exercised its rights of control and ownership of said property by granting and vesting it in the owners of the land abutting thereon.

The appellants herein are the owners of the land abutting on this particular portion of the right of way. Therefore, it follows that they are constitutionally and equitably the owners of the extra 300 feet of this right of way. That they are the grantees of the United States government. That they by the grace of Congress have become the beneficiaries of the reverter feature of the parent Act of 1862. That they have succeeded to the reversion to the United States in this particular strip of the public lands. That it was abandoned by the railroad company for the designated railroad purpose.

That the title of the railroad company always contained this condition subsequent—this reverter clause. That nothing has been taken from the railroads. That the government has done exactly what it agreed originally to do in the parent Act of 1862. That the railroad company itself has permitted the contingencies to arise whereby the reverter and limited fee features of the parent Act take effect. Congress has validated affirmatively what the railroad company has accomplished or allowed to be accomplished negatively. The railroad company abandoned the land. Congress has accepted the abandonment and reverter and disposed of the reverted lands to other persons. They are Messrs. Stuart and Murray in the case at bar.

CONSENT OF RAILROAD COMPANY NOT NECESSARY. IF NECESSARY, AN EXPRESS OR NECESSARILY IMPLIED CONSENT EXISTED AND TOOK EFFECT IN THE ORIGINAL ACT OF 1862 FROM THE DAY OF ACCEPTANCE OF THE SAME BY THE RAILROAD COMPANY. RAILROAD COMPANY IMPLIEDLY CONSENTED WHEN IT ALLOWED TITLE BY ADVERSE POSSESSION TO RIPEN AND ABANDONED AND FAILED TO USE THE LAND FOR THE DESIGNATED RAILROAD PURPOSE.

Counsel for appellee in their brief (appellee's brief pp. 125, 126) complain that this Act of 1912 is very different from the Northern Pacific Remedial Act of 1904. They call attention to the fact that the Northern Pacific Act contained a clause providing that the Act should not become effective until accepted in writing by the railroad company. There is no acceptance clause in the Act of 1912. Nothing was said by Your Honors in the Ely case indicating that this acceptance clause was of any importance. If the acceptance clause was decisive in the matter and the railroad company could accept why was a judicial determination of the validity of the Act necessary before Your Honors?

Curiosity leads us to speculate on whether the Union Pacific Railroad Company is now adhering to its contention that no act of acceptance or other making its contention that no act of acceptance or other act of the railroad company either voluntary or involun-

tary could in any manner affect the inalianability feature of the original grant of 1862. That has always been their contention and the Courts have sustained this contention on the theory that the grant to the railroad company had coupled with it the public duty of rendering public service as a railroad, and had also coupled with it certain interests of the United States for postal and military purposes. Is the railroad company abandoning that contention now?

Therefore, if we are to be consistent, I mean if the railroad company is to be consistent in its arguments, we must still abide by the decisions and by their contentions that any act of acceptance by them amounted to nothing. They could not relieve themselves from the designated public service which they were to perform. They could not relieve themselves nor deprive the government of its interest in the right of way for military and postal purposes. The acceptance in the Northern Pacific act is surplusage and neither makes the act stronger nor weaker. An acceptance is useless and without force. The railroad company can not agree to alienate any part of its right of way, either directly or indirectly.

Finally we contend that the consent of the railroad company to this Act of Congress has existed since the Act was passed in 1862. We are almost justified in saying that the consent was given affirmatively in 1862 and has followed the grant down through all the years. If the consent was not expressly and affirmatively given it certainly was given by necessary implication. The reservations of Congress in the parent Act of 1862 to itself, and the construction of this Act by Your Honors in the Ely

case, with reference to the limited fee and implied reverter existing always in the Act of 1862, necessarily implied a consent in the railroad existing from the very moment they accepted in writing any of the benefits of the parent Act of 1862.

Therefore, we contend:

(a) that no consent of the railroad is necessary to this Act of June, 1912;

(b) that, if it is necessary, there is either an affirmative or express consent, or a consent necessarily implied in the parent Act itself and that this consent has ambulated from day to day, and year to year, from 1862 to the present date. That this consent is inseparably coupled with and follows the original Act of 1862. That this consent exists today. and existed June 24, 1912, when the remedial act was passed.

Also we might ask why is there any need of consent by the railroad? They again consented when they allowed title to ripen by adverse possession. They also consented when they allowed title or rights to mature through their abandonment and failure to use the right of way for railroad purposes. It was not granted for agricultural purposes. The railroad was not to go into the farming business and lease its right of way for that purpose. When either of these things occurred, under Your Honors' decision in the Ely case the title to the abandoned land reverted to the United States. Then we may justly say that the title to this land passed on by the Act of June, 1912, belonged to the United States. The

United States was granting its own land. Surely the government of the United States does not need the consent of the railroad company before it can grant its own property.

Quality of Alienability Added to Railroad Grant by Act of June, 1912. Railroad Complains of Being Divested of Vested Rights. Congress on the Contrary Grants Railroad Additional Power and Right of Alienability.

Another interesting feature of the Act of June 24, 1912, is that it imparts to the original railroad grant of right of way of 1862 the *quality of alienability*, as against the government. This quality the original grant did not have. In fact, the original grant said nothing about whether the right of way should be alienable or not.

Inalienability of the grant of the right of way became a part of the Act of 1862 by judicial construction. Particularly was it determined by this Honorable Court that the right of way was inalienable in the case of Northern Pacific vs. Townsend, 190 U. S. 271.

The Act of 1912 provides, that "all conveyances or agreements *heretofore* made" are validated and legalized.

Then it proceeds to declare "and *all* conveyances or agreemnts confining the limits of said right of way or restricting the saem are hereby legalized, etc."

The first portion referring to conveyances "heretofore made" is retrospective and covers the rights inuring back to the United States through the limited face and

reverter in the original Act. This Act is both retrospective and prospective.

If our construction is correct then hereafter the Union Pacific Railroad Company may at its pleasure convey and otherwise alienate any of said 400 foot right of way, except the expressly reserved 50 feet on each side of the center of the main track of the railroad as now established and maintained necessary to carry out the public purposes for which the road was created. This limitation is found in section 3 of the Act of 1912.

Therefore we respectfully suggest to the Court that the Act of 1912 is further remedial in that it has adopted the very construction placed upon the railroad right of way Act of 1862 by Your Honors through the opinion of Chief Justice White in Northern Pacific vs. Townsend, 190 U. S. 271, viz.: that the railroad has had no power to alienate any part of this right of way either directly or indirectly without the consent of the government of the United States; that this is true because the Government has a reserved interest in said grant and because the public has a reserved interest in said grant. That the Union Pacific cannot alienate its right of way without the consent of the interested parties—the Government of the United States and the public. That the Government is the trustee of the general public; that it is affirmatively found in the case that the public as well as itself is fully protected by a hundred foot right of way.

Therefore it has, by the proper means of expression, to-wit, an Act of Congress approved June 24, 1912, now given its consent that the railroad should be able to alienate any part of its 400 foot right of way

except the reserved and limited 100 feet in section 3 of said Act. Thus we observe a new quality and power is imparted to the railroad grant of 1862—alienability.

Vested Rights. Government Has Vested Rights in the Right of Way Act of 1862 as Well as the Railroad.

We are thoroughly in accord with the law of the land protecting vested rights. We believe and agree that no *ex post facto* laws and no laws impairing the obligation of a contract can be passed constitutionally. We agree with the doctrine of the Dartmouth case, the principles laid down in the Magna Charta and the innumerable cases protecting vested rights referred to by counsel.

Therefore we are bound to contend here that the vested rights of the United States Government should be protected as well as the vested rights of the railroad. The United States reserved to itself the right to alter, amend or repeal the Act of 1862. It also limited the fee in the grant. It also reserved to itself an implied reversion in any right of way lands which the railroad abandoned or failed to use for railroad purposes as has been positively detremined by this Honorable Court.

Therefore we are constrained to say that the appellee railroad company here should not obstruct the United States in disposing of its vested rights. It has a vested right to dispose of these abandoned and reverted lands. It has a vested right to confirm the acts, voluntary or involuntary, creating conveyance of title, by the railroad company. In thus validating titles created and arising out of adverse possession and in thus legalizing titles in abut-

ting owners by expressly granting to them the Government's own lands acquired through the implied reversion in the original Act of Congress, Congress is doing nothing more than exercising the usual powers which accompany the enjoyment of vested rights.

No vested rights of the railroad company are either injured or destroyed. It never had any vested rights in any of the 400 foot right of way which it could not use or failed to use for railroad purposes. Therefore when Congress takes this and gives it to someone else, the railroad having no such unconditional right to it, has lost nothing.

Congress, in the Act of June 24, 1912, has reconsidered its opinion of 1862 as to the necessary width of right of way for the railroad company. This it might do, as is conclusively determined in Northern Pacific R. R. Co. vs. Ely, 197 U: S. 1, 7.

Appellee complains, on page 135 of its brief, that the Act of June 24, 1912, if given a retrospective operation would confer upon acts and omissions occurring in the past a legal effect which they did not have at the time they occurred. And by virtue of such retrospective operation, would transfer titles now vested in the Union Pacific R. R. Co. to others not now invested.

We canont agree with this kind of logic. The acts and omissoins at the moment they occurred had the legal effect which they created under the ordinary rules, principles and laws applicable to said acts and omissions. The enforcement of the legal effect may have been postponed until the remedial acts were enacted.

It seems to us that the legal effect might be con-

sidered a *float*, something like the taking effect of the original grant of right of way of 1862, which did not actually attach to a particular piece of land until an Act was passed or a map filed definitely locating the finally adopted route.

Union Pacific R. R. Co. vs. Harris, 215 U. S. 389.

M., K. & T. R. R. Co. vs. Cook, 163 U. S. 491.

According to the doctrine of Northern Pacific vs. Ely, 197 U. S., 7, 8, and Northern Pacific vs. Townsend, 190 U. S. 271, the limited fee and implied reverter has always, by necessary implication, been embodied as to the right of way, in the Act of 1862. This being the case, at the very moment any acts or omissions occurred on the part of the railroad company which would put in operation the reverter and limited fee provisions, the legal effects and consequences of said acts and omissions became *in esse*. Only their enforcement by the United States the interested party, has been deferred. They were a float and the railroad company enjoyed immunity by sufferance from the legal effect of its acts until Congress elected to enjoy and enforce these reverted rights, which it had originally reserved to itself in the parent Act of 1862.

There is nothing retrospective about the Act of June 24, 1912. It does not impair the obligation of any contract. It simply puts affirmatively in force what has already occurred and is *in esse* by the very acts and omissions of the railroad compnay itself.

The railroad company could not safely ignore the doctrine of Northern Pacific vs. Townsend, 190 U. S. 267. It was also charged with the knowledge of the terms and the meaning of the Act of 1862, through which it derived its title. In that Act we might say, there were certain covenants running with the title to the right of way. These were covenants of limited fee and reverter in the United States; the right to amend and alter, and the right of the United States to use for postal and military purposes, especially in time of war.

Land Grant Was in Fee Simple. Title to Right of Way Is a Limited Fee with Reverter. Therein the Two Differ.

Appellee at page 131 of its brief, cites from the Sinking Fund cases 99 U. S. 700, 718, for the purpose of showing that Congress cannot legislate back to itself.

We thoroughly agree with what Chief Justice Waite there said. We also quote some of it:

> "They cannot legislate (speaking of the United States and States) back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad."

This short quotation clearly shows the distinguishing feature. The Sinking Fund cases were with reference to the land grant, not the right of way. The land grant was in fee simple. True, these lands were given to aid in the construction of the railroad. This land vested

unconditionally in fee simple in the railroad company as soon as it performed certain conditions subsequent set forth in the Act. These have been performed. Thereafter the railroad company has owned said land absolutely and had the power of alienability as to these lands which it did not have as to the right of way. There was no limited fee, no implied reverter as to the lands.

Certainly the United States or the States could not take back to themselves lands granted in fee simple. That would be not only depriving the corporation of property without due process of law, but would be confiscation.

Chief Justice Waite further said in the portion of his opinion quoted by appellee, pp. 131-132:

> "No change may be made in the title created by the grant of the lands or in the contract for the subsidy bonds without the consent of the corporation. All this is indisputable."

We fully agree. There is no change made by the Act of June 24, 1912, in the title to the right of way created by the Act of 1862. Your Honors will note again that Chief Justice Waite referred to "grant of the lands" not to the right of way. The title originally created to the right of way by the Act of 1862 had the same conditions attached to it as it had on June 24, 1912. The fee was limited, there was an implied reverter in the United States. Those covenants and conditions run with the right of way grant. The railroad company had notice thereof. It accepted the grant and agreed to the conditions.

Nothing therefore was taken away by the Act of

June 24, 1912. That Act simply recognized, affirmed and enforced what was agreed to by the railroad company fifty years ago in the parent Act of 1862. The Act of 1912 recognizes and enforces the vested rights of the United States reserved to it in the Act of 1862. It divests nothing from the railroad. Vested rights were not disturbed. On the contraty the vested rights of both the Government and the railroad company are confirmed and established.

Northern Pacific R. R. Co. v. Townsend, 190 U. S. 267;
Northern Pacific R. R. Co. v. Ely, 197 U. S. 1;
Northern Pacific R. R. Co. v. Hasse, 197 U. S. 9.

Acquisition of Present Union Pacific Title Through Foreclosure Proceedings Does Not Change or Affect the Situation.

We have read with interest appellee's argument at pages 139 and 140 of its brief contending that the recent foreclosure of mortgages, including the foreclosure of the lien of the United States ,is a conclusive reason against the validity of the statute in question.

We cannot discover that conclusive reason. To find out what title the mortgagees had and therefore what title the Union Pacific has as successor, of the mortgagees under foreclosure proceedings it is necessary to go back to the origin of the title. The title originated from the Government. The original grantees in the Acts of 1862 and

other Acts had only such title as the United States granted to them. We have already shown extensively that this title was a limited fee, contained an implied reverter and was subject from the beginning and always to the reserved right of Congress to alter, amend and repeal.

Therefore, when the original grantee executed a lien back to the United States it covered only such title as the mortgagor had. It could not mortgage something it did not have. It could not by a lien make its grant of right of way unconditional and alienable.

Consequently, in very truth the Union Pacific Railroad Company does "stand in the shoes of the mortgagee" as said by railroad counsel on page 140 of his brief. Thus by standing in the shoes of the mortgagee the Union Pacific has no more title than the mortgagor originally granted to the mortgagee.

Under this argument, and we believe it is sound, we wish to cite the same cases to support our contention as are cited by appellee on page 140 of its brief.

We also wish to agree and contend that "The rights of the purchaser at the foreclosure sale are precisely those of the mortgagee, and, like his, relate back to the mortgage."

Secor vs. Singleton, 41 Fed., 725, 728.
Osterberg vs. Union Trust Co., 93 U. S., 424.
Jones on Mortgages, Vol. 2, Sec. 1654.
De Haven vs. Landell, 31 Pa. Sta., 120.
Gamble vs. How., 40 Mich., 561.
Davis vs. Life Ins. Co., 84 Ill., 508.
Heirs vs. Simpson, 4 Mo., 319.

Ritger vs. Parker, 8 Cush., 145, 149.
Rector, &c., vs. Mack, 93 N. Y., 488.

Some Things Congress Said in Passing the Act of June 24, 1912. Also What Union Pacific Attorney Said Throws Some Light on Intention of Congress.

We had decided to end this brief here but the Court may consider us remiss in our duty if we do not shed a little of the light to be gathered from the debate on this Act after having read the same ourselves. We will quote first from a printed Congressional document entitled "Serial No. 2, Hearings Before the Committee on the Judiciary, House of Representatives 62nd Congress, Second Session on H. R. 16689, April 6, 1912.

We invite your attention first to page 46, to a question by Congressman Norris of Nebraska and the answer of Attorney Loomis for the Union Pacific Railroad Company, as follows:

> "*Mr. Norris.* Now, Mr. Loomis, I want to ask you, unless it would interfere with the order of your argument—I would like to ask your judgment on the deed that Mr. Todd has referred to and has been spoken of often as Greeley. Do you consider that the railroad company is bound by the stipulations as contained in that deed granting a right of way of only 50 feet on either side through the town of Greeley?
>
> *Mr. Loomis.* I would hesitate a long

time, Mr. Norris, before I would advise the company to rupidatee that agreement."

It would appear that in Congress Union Pacific Attorneys hesitate to rupidate the Union Colony—railroad company right of way agreement, but in this Court, case No. 490, October Term, 1912, entitled Union Pacific Railroad Company vs. City of Greeley, et al., they do attempt to repudiate with all the power they can muster.

We call attention again to page 48 of said document to a colloquy between Congressmen Carlin and Attorney Loomis as to the interest of the government in this 400 foot right of way. It is as follows:

Mr. Carlin. Mr. Loomis, we are trying to get at the real milk in the cocoanut. What is the interest that the Government has in this 400 feet?

Mr. Loomis. The road was organized for the particular purpose of creating a highway over which to transport troops, provisions, munitions of war, and the mails, and under the foreclosure decree the preference rights of the Government in the use of the road for these purposes are protected, and it still has an interest in the property under that decree.

Mr. Carlin. What interest have they in this 400 feet?

Mr. Loomis. The Supreme Court of the United States held that the right of way was granted to this railroad company to enable it to carry out, among other things, its public obligations; its obligations to the Nation.

Mr. Carlin. That is the railroad side of it. What interest has the Government in this 400 feet?

Mr. Loomis. I am trying to explain it to you The Supreme Court of the United States held that in view of the fact that Congress gave 400 feet right of way, it conclusively determined that that width of right of way was necessary to enable the railroad company to carry out its obligations to the Government.

Mr. Carlin. Do you think that answers my question as to what interest the Government has in that line? Have we any interest, any reversionary interest in it?

Mr. Loomis. If it is abandoned I think the title goes back to the Government.

Mr. Carlin. Then if it is abandoned for railroad purposes it goes back to the Government. Is that portion which you are using abandoned?

Again Mr. Loomis and Mr. Carlin debate the intention of Congress on pages 50 and 51 of said document as follows:

Mr. Loomis... Now, counsel admits that the question in the Nebraska case is one which the courts can settle. The case is pending in court now, but they say they want Congress to act upon the matter so that if the court decides adversely they will have a second bow to their

string and their rights will be protected.

Now, my suggestion is this, that in view of the fact that this matter is pending in court, why is there any necessity for Congress to act upon the matter at all until the court has made its decision.

Mr. Carlin. Of course, independent of that position, to get really down to the root of the thing, assuming that Congress has some right in this land or they would not be asked to validate anybody's deed or title, it does occur to me that your company puts itself in a very unreasonable attitude when it contends that it ought to have 400 feet reserved there for right of way, when they practically have one track, which requires about 13½ feet, and that 28 tracks could be laid on 400 feet. How many years do you think it will probably be before your company will need all that land for a right of way?

Mr. Loomis. We need the full width in many places now. We use it for fire guards on the outer boundary; use it for earth necessary for fills; for sidings, when side tracks are necessary; for station grounds; for snow fences, etc.

Mr. Carlin. Then, that is not properly right of way; that is maintenance, and not right of way. You could use it for ballast, for that matter.

Now, you do not mean to contend before this committee that your company, in any reas-

onable length of time, could possibly anticipate the use of 400 feet there for right of way?

Mr. Loomis. I do; and as I say to you now, we can use 400 feet of right of way for legitimate railroad purposes.

Mr. Carlin. Maintenance is not right of way.

Mr. Loomis. It seems to me that it is.

Mr. Carlin. It is a very different department of railroading. The right of way of a railroad is one thing and maintenance is another thing; for instance, ballast is a part of maintenance, but it is no part of right of way.

Mr. Loomis. It is customary in every State where a railroad right of way is permitted to be condemned to allow a greater width in places where it is necessary for the purpose of securing earth and gravel for construction and maintenance purposes.

Mr. Carlin. That is all right, but not where you get something for nothing from the Government for doing that.

Mr. Loomis. The right of way under consideration was no gift. We earned it and paid for it.

Now, suppose there was no question as to portions of the right of way having been alienated by the company, do I understand you to mean that after Congress has given us 400 feet right of way they have the right to come in now and take a portion of it away from us?

Mr. Carlin. No; I think that if Congress has any interest in it at all, as to such interest as it has, it can make its expression by statute as to the limitation of this right of way, and I do contend that 400 feet is not only unreasonable, but it is unconscionable for a railroad to undertake to say it can have right of way uses for it. I do not know in any agricultural section of this country any railroad that occupies anything like that quantity of land for a right of way. Of course, where station and depots are erected they usually purchase land for that purpose by condemnation at that particular point, but except where a station exists or a side-track they do not occupy 400 feet or take 400 feet for a right of way. I am not sure that it is not unprecedented.

Again Mr. Norris and Mr. Loomis debate the width of right of way on page 54:

Mr. Norris. Now, suppose your right of way was 200 feet only and you believed that it was necessary to have 400 feet for the purpose of plowing fire guards, as you said that was your object in keeping this land.

Mr. Loomis. I meant to say that was one of the objects.

Mr. Norris. Well, if there are any other, we would like to hear them. Now, if you have to go into court for 200 feet, do you think any court would permit you to acquire title to an ad-

ditional 200 feet if the only reason you could give would be that you wanted it to plow fire guards on it?

Mr. Loomis. No; I do not think so.

Mr. Norris. That is what you seem to request.

Mr. Loomis. But Congress has already given it to us.

Mr. Norris. Congress did not give it to you, and the question in my mind is that you may win all these suits from the description we have got today; but the question is that when you have given it, shall we validate your act?

Some of the Report of the House Committee on the Judiciary on the Passage of Said Act of June 24, 1912.

We will now quote some passages from the report of the committee on the judiciary accompanying H. R. 16689 being report No. 593 House of Representatives 62nd Congress, second session.

All of this report is interesting but we must limit our quotations. This report clearly shows the Colorado and Nebraska right of way situation. It also shows that Congress had before it and clearly in mind the two cases of Northern Pacific R. R. Co. vs. Townsend, 190 U. S., 267, and Northern Pacific Ry. Co. vs. Ely, 197 U. S., 1.

We quote from pp. 3 ,4 of said report as follows:

"As a rule, in most of these new towns the principal street ran parallel with the railroad

and was improved by the usual improvements and buildings that would be constructed in growing villages and cities. Some of these towns have grown to be cities. In the city of Grand Island, Nebr., this street, known as Front Street, is located entirely on this 100-foot strip of disputed territory. It has for quite a number of years been a paved street and been so maintained by the city. For quite a number of blocks the street is built up with modern buildings and occupied by business houses of various kinds. If this 100 feet were now taken by the railroad company as a part of its right of way it would leave all these buildings without any means of access except through an alley in the rear. All along the line of the railroad throughout this State various kinds of improvements have been made. In the country the land for the most part is in a high state of cultivation and is worth from $75 to $150 an acre. Where the railroad company, on its odd-numbered sections, sold its land either to farmers or to purchasers of town lots, it has received pay for this 100-foot strip that is in dispute on each side of the line of the right of way. Where the even-numbered sections were taken by settlers and title acquired from the Government these settlers, in most instances, paid to the Government of the United States the sum of $2.50 per acre for all this disputed tract.

"Until within a few years ago, no one had questioned the legality of the title of the individual property owners along the right of way. For 40 years lands in the country and lots in the villages and cities had been improved and transferred in the usual course of business, and taxes have been paid upon this disputed strip by such owners, on the theory that they had a perfect title. Within the last two years, however, the railroad company, both in Colorado and in Nebraska, have begun to assert their title and their right to the possession of the entire 400-foot strip, claiming that their title and right of possession is derived from the Act of 1862, which fixed the right of way at 400 feet.

"Various actions have been commenced in both States to acquire possession of the disputed strip and are now pending both in the State and United States courts. An examination of the authorities and the decisions of the Supreme Court will, I think, lead to the conclusion that unless some legislation similar to that intended by this bill is enacted by Congress the railroad company will be successful in these suits and the titles of the property owners to this disputed strip will be annulled and set aside. In many instances, in cities and towns, it will mean the financial ruin of many people whose accumulations of nearly a lifetime will be lost, and all this will be brought about without any possible good or benefit to the railroad company."

We also quote from page 6 of said report as follows:

"It will be noticed that the remedial legislation in that case was passed while the question was pending in the courts. The facts in that case were very nearly identical with the facts in this case. The legislation in that case was practically identical with the bill in this case. It will be seen, therefore, that the decision in Northern Pacific Railway Company v. Ely was upon a state of facts and a condition of law which would be practically identical with existing conditions if the present bill were enacted into law. It is important to note, therefore, that in the Ely case the Supreme Court of the United States, while still adhering to its decision in the Townsend case, gave full effect to the remedial legislation provided in the Act of April 28, 1904, above quoted. The decision was rendered on the 20th day of February, 1905, and the first paragraph of the syllabus reads as follows:

"Northern Pacific Railway Company v. Townsend (190 U. S., 267) affirmed as to the point that individuals can not for private purposes acquire by adverse possession under a State statute of limitations any portion of the right of way granted to the Northern Pacific Railway Company. But by the Act of April 28, 1904, that right of way was narrowed to 200 feet in width and title acquired to land outside of a strip of that width was confirmed."

Further on in the opinion the court uses the following language:

"The Act of April 28, 1904, in view of our decision in that case (Townsend case) was obviously intended to and did have the effect to narrow the right of way to 200 feet in width, so far, at least, as outside of that strip the original right of way had been parted with."

After reviewing the authorities on the question of adverse possession the court sums up the argument as follows:

" 'Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance.'

"So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession and occupied the same position as if they had received conveyances, which the Act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly."

We also quote from page 10 of said report as follows:

"It seems plain that these conditions demand relief at the hands of Congress, similar to that given the property owners in the Northern Pacific case. The equities are all against

the railroad company. It ought not to be allowed, after a period of 40 years, to violate its solemn obligations or to deprive men of property and property rights which they have honestly and fairly acquired. The bill, if passed, will not take from the railroad company one foot of land that it has not by its own act either directly or indirectly deeded away. The proposed legislation only gives validity to acts that the railroad company has heretofore done. It would only prevent it from refusing to be bound by its own action. There can be no successful claim made that the railroad company needs a right of way 400 feet in width. It is a wider strip than is allowed under the statutes of any State in the Union. It is impossible to conceive that the time will ever come when the railroad company will need this much of a right of way. It has never used it in the past. It is not pretending to use it for railroad purposes now. Under its charter, it can not use it for anything except for railroad purposes. At the hearing, the attorney representing the railroad company claimed that they would be able to use this 400-foot strip through the country for the purpose of plowing fire guards thereon and that they ought to be permitted to retain it all so as to have sufficient right of way upon which to build additional tracks, if the business should ever develop sufficiently to warrant it.

"No one can conceive that the time will ever come when this railroad will need 400 feet

upon which to build additional tracks for the transaction of its business, and it is hardly reasonable to believe that the railroad company wants or that it ought to have this wide strip of territory simply for the purpose of plowing fire guards. At least, it could not expect to plow fire guards through the cities and towns where the claims being made for a 400-foot right of way. Wherever it has maintained its right of way and used it, this bill will not interfere with such usage. No one can claim that the railroad company would in any way be injured by this legislation. It can not possibly use the land. This wide strip would be of no possible benefit to it. It could not dispose of it. It could not use it for manufacturing purposes, but under its charter would be compelled to use it entirely for railroad purposes. It can not, therefore, be injured by the legislation. The lack of the legislation, however, is injuring thousands of people and divesting them of many years of their labor. Neither is it any answer for the railroad company to say that in exceptional cases it does not intend to commence action against property owners. The very fact that the title is not valid interferes with business and destroys the value of the property. By no act of the railroad company can the title be made valid. It will take an act of Congress to do this. It is believed the bill in question will accomplish this purpose. Its effect will simply be to validate the acts of the

railroad company and to give legal effect to the action heretofore taken by the railroad company."

Some of the Report of the Committee on the Judiciary in the Senate on said 1912 Act.

We quote briefly from Senate Report No. 868 62nd Congress, second session, accompanying H. R. 16689 and S. 6587.

We quote from page 2 of said report as follows:

"The patents from the Governments are silent with respect to any right of way and the conveyances by the railroad company are not uniform. It is said that some of them make no exception of the right of way, others except the right of way without specifying width, others except 200 feet, and still others except 400 feet. During all the years between 1864 and 1898 the various railroad companies, which may be termed the Union Pacific, pursued no consistent policy with respect to the width of its right of way. It laid out towns upon its odd-numbered sections with streets within the 400 strip, sold lots abutting these streets, and permitted permanent buildings to be erected thereon. In other cases it sold a part of the right of way itself, making conveyances therefor. When its right of way was fenced in the country, it sometimes fenced it 100 feet in width, sometimes 200 feet, some-

times 400 feet. It permitted the farmers on either side to fence their farms sometimes up to 50 feet, and sometimes up to 100 feet of the line, and for 40 years or more many of these farmers have cultivated the land up to the right-of-way fences, paid taxes upon it, and exercised all the rights and borne all the burdens of ownership.

"In 1898 the well-known foreclosure of the Government lien and other mortgage liens resulted in foreclosure sales and reorganization. Since that time the present company has been rather industrious and energetic in the effort to exclude adjacent owners from the right of way 400 feet in width or to induce in the country the farmers to accept leases for that part of the right of way which has been occupied and cultivated as farms. Many suits are pending which have for their purpose the exclusion from the original right of way of the private owners who have acquired a part of it either by conveyance or adverse possession."

RAILROAD COMPANY BARRED BY DOCTRINE OF EQUITABLE ESTOPPEL FROM CLAIMING MORE THAN 100 FEET IN ANY EVENT.

This is a suit in equity—a quiet title suit. Therefore all the fundamental principles of equity apply to this case.

Loss of portions of the 400 foot right of way granted by the Acts of Congress to the Union Pacific Railroad Company by *equitable estoppel* is extensively considered by the Circuit Court of Appeals in Union Pacific R. R. Co. vs. City of Greeley, et al., 189 Fed. 1, 13, 14, 15. After calling attention to the facts upon which an equitable estoppel may be based in the case at bar, we will cite authorities on the subject presented to the Circuit Court of Appeals, some of which are cited by the Court in its opinion.

While the facts in the instant case creating an equitable estoppel are not in every respect similar to the Greeley case, there are many points in common. The Greeley lands were more developed and improved than the lands at bar. We contend that as the rule with reference to facts sufficient to constitute adverse possession is not as stringent on unimproved lands, that the rule is not so strict as to facts sufficient to create an equitable estoppel on unimproved lands as upon improved lands.

The facts creating the equitable estoppel in this case are just such facts as would be expected with reference to the unimproved property involved. If the facts in this case show that the railroad company was silent with reference to its claim of title to right of way when conscience required it to speak it should be debarred from speaking when conscience requires it to keep silent.

Let us now enumerate a few of the facts upon which equitable estoppel may properly be based in this case:

1. Railroad Company made no open and notorious claim to any land other than about twelve feet actually occupied by its track and embankments until about the time of the beginning of this suit.

2. That shortly after the beginning of this suit the railroad company made open and notorious claim only to 100 feet by placing fences on each side of its track fifty feet from the center line.

3. That from 1866 to the present time, nearly 45 years, the railroad company had notice from the public records of the county assessor's and county treasurer's offices that the plaintiffs and their predecessors in title had paid all the taxes on this land, including all the right of way, which taxes aggregate at this time about $60.00 per acre.

4. That the railroad company has never paid any tax upon the land occupied by its track and embankment, not to speak of the entire 400 foot strip.

5. That the railroad company well knew and was charged with notice of the final receiver's receipt to this entire 160 acres of land, including the right of way, filed for record in the county of Arapahoe July 12, 1867, and the patent from the United States issued upon the entire tract without any reservations, on October 1, 1867. Notwithstanding, notice to appellee company of claims of petitioner's predecessor in title by the public records of the foregoing conveyances, said appellee did nothing for about forty years except build its one line of track, to show its claim to said 400 foot strip.

6. That during some forty years and to about the date of the beginning of this suit, the railroad company knew, from the public records, that deeds of conveyance were being given from time to time to successive purchasers on the entire quarter section, including said 400 foot strip, without any reservations, and that the vari-

ous owners were thus claiming the entire tract. That during said entire period the railroad company and its predecessors did nothing to protest or to undeceive these claimants.

7. That for more than forty years defendant railroad company and its predecessors have never denied or questioned the plaintiff's title.

8. That said railroad company failed by a sin of omission to make claim to its title when it was called upon in equity to do so by the acts and claims of petitioners and their predecessors. On the contrary the railroad company has affirmatively acknowledged the title of petitioners. Before this suit was begun it had negotiated with the appellants for the purchase of this right of way through this land.

9. The appellants or petitioners and their predecessors have been in continued, open, notorious, adverse possession of all these lands as against the world. We have shown elsewhere in this brief what facts are necessary to constitute adverse possesion of unimproved lands. Appellants are charged with notice of this adverse possession. Equity called upon appellees by reason of this adverse possession, to speak and make known their claims more than thirty years ago.

10. Attorney Orahood, then attorney for the Kansas Pacific, predecessor in title of appellee, admitted to the then owners of these lands, between the years 1892 and 1895 that the Union Pacific, then known as the Kansas Pacific, had no right of way through these lands. He negotiated in behalf of the railroad for the purchase of a right of way with the then owners. He did not in-

timate or make any claim whatever of a right of way for the said railroad across any portion of the lands in controversy. This was a situation in which equity called strongly upon the railroad company to speak and assert itself with reference to the right of way. It did not do so; it allowed appellant to continue in the belief that it owned the entire quarter section free from any 400 foot right of way claim or any claim at all. Does not equity estop the railroad company from now asserting a 400 foot claim or any other claim for right of way?

LAW OF EQUITABLE ESTOPPEL

TEXT WRITERS STATE THE FUNDAMENTAL PRINCIPLES OF ESTOPPEL AS FOLLOWS:

"It is a fundamental rule of law that, where a party's declaration of conduct has induced a third party to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequences would be to work an injury to such third person or to someone claiming under him. * * * The doctrine of estoppel is applied to promote justice and fair dealing." 2 Beach on Modern Equity Jurisprudence, Par. 1092.

"A person who negligently and culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he him-

self assisted in deceiving." Bigelow on Estoppel, 565.

"He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent." 2 Herman on Estoppel, Par. 937.

"Where a party negligently and culpably stands by and allows another to contract on the faith of an understanding which he can contradict, he is afterwards estopped from disputing the facts in an action against the person whom he has assisted in deceiving, upon the principle that between innocent parties he who causes the injury must suffer." Section 938, Id.

"The principle that one should be stopped from asserting a right to property upon which he has by his own conduct misled another, who supposed himself to be the owner, to make expenditures, is often applied where one owning an estate stands by and sees another erecting improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive or such gross negligence as to amount to constructive fraud." Section 975, Id.

In Wendell v. Van Renssalaer, I Johns, Ch. (N. Y.) 344-354, Chancellor Kent stated the rule as follows:

"There is no principle better established in this Court nor one founded on more solid

considerations of equity and public utility than that which declares that, if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel." 189 Fed. p. 13.

The following list of cases recognize and sustain these principles of equitable estoppel:

Trenton Banking Co. v. Duncan, 86 N. Y. 221;
Anderson v. Armstead, 69 Ill. 452.
Pence v. Arbuckle, 22 Minn. 417.
Morgan v. Railroad Co., 96 U. S. 716, 24 L. Ed. 743;
Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79;
Evand et al. v. Snyder et al., 64 Mo. 516.

Judge Munger in Union Pacific R. R. Co. v. City of Greeley, et al. 189 Fed. p. 14, and elsewhere in the same opinion, holds that the doctrine of equitable estoppel fully applies in the Greeley case. We think the facts above mentioned make a good case of equitable estoppel here as well.

Doubtless counsel for appellee will cite, as holding that equitable estoppel could not apply in this case, the

following two cases: Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267; Union Pacific R. R. Co. v. Kindred, 168 Fed. 648. They were cited in the Greeley case. The Court disposed of them in the following language:

> "The decisions in the cases of Northern Pacific Ry. Co. v. Townsend and Union Pacific R. R. Co. v. Kindred, *supra*, in no respect conflict with such view. In those cases the question involved was simply whether a portion of the right of way could be acquired by a private person for an exclusively private use by an application of the doctrine of adverse possession. *No principle of estoppel was involved or applicable to the facts in either of those cases.*"

Therefore the subject of equitable estoppel is open to your Honors in this case. This court at least once before recognized that the doctrine of equitable estoppel may be considered in right of way cases arising under Acts of Congress.

> Spokane and B. C. R. Co. v. Washington and G. N. R. Co., 219 U. S. 166.

The Court says: 189 Fed. p. 15:

> "That complainant's right of way was acquired by virtue of an Act of Congress does not exclude, under a proper state of facts, the doctrine of equitable estoppel. We think, recognized by the Court in Spokane and British Columbia Ry. Co., 219 U. S. 166; 31 Sup. Court, 182, 55 L. Ed. ————, heard on

> error from the Supreme Court of the State of Washington, a case involving under a grant by Congress of a railroad right of way, the Court refusing to consider the question of estoppel for the reason that that was not a federal question."

Judge Munger also says, at the end of his opinion, 189 Fed. p. 17:

> "Considering all of the foregoing facts, that the acquisition of the property by the respondents is for public and not for private use, that the portion of the same which encroaches upon the complainants alleged right of way is not now required by the complainant and so far as disclosed by the evidence will not be necessary in the near future to enable complainant to fully and freely discharge its duties to the public, we think complainant fully estopped from now claiming as against these respondents that it is entitled to the present possession of the entire 400 foot right of way."

It would sanction a most palpable fraud to permit the railroad company after 40 years of inaction and affirmative recognition of the title and claims of the owners of the lands involved to assert their claim to a 400 foot right of way at this time. The doctrine of equitable estoppel clearly ought to apply.

FALSE PREMISES ASSUMED BY APPELLEE THROUGH INACCURATE STATEMENTS OF FACTS. BULWARK OF AUTHORITIES WHICH AT FIRST LOOK PERSUASIVE ARE BUILT UPON THESE FALSE PREMISES BY APPELLEE RAILROAD COMPANY.

Able counsel for the railroad company filed a persuasive brief. After reading it, I found it interesting to tabulate the inaccurate statements of facts upon which much of the plausible argument of appellee is based. It occurred to me that Your Honors might also be interested in this brief summary, and I am submitting it herewith.

Learned counsel for the railroad company, when once they have a proper premise of fact, follow it with an attractive argument, and bulwark both the premise of fact and the argument with a militant array of authorities.

We respectfully invite Your Honors' attention to the suggestion that in most cases there is not so much the matter with the law and the authorities cited as with the facts assumed as a starting basis.

We note the following errors which we have discovered or which have already been pointed out in the briefs filed:

1ST. INSTANT CASE BEGUN IN STATE COURT: FEDERAL EQUITY RULES NOT CONTROLLING.

This is a quiet title suit started in the State Court.

Overlooking this fact, appellee on pp. 12 and 13 of its brief assumes that the Federal equity rules of practice as to proof of title and possession must control. Having safely passed by the fact that the case began in the State Court, appellee cites a long list of Federal cases supporting its contention.

2ND. NEXT ERROR: ASSUMED TITLE AND POSSESSION NOT PROVED.

In reaching the conclusion and citing said authorities, appellee also assumed that petitioners and appellants did not prove title and possession in themselves at the time of the action. There was abundant proof showing appellants' title and possession at the time of the beginning of the suit and five years before the action was begun. (Record pp. 88, 89; Appellant's Reply Brief, pp. 4, 5, 6.)

3RD. PROOF OF ADVERSE POSSESSION OF UNIMPROVED LAND NOT STRICT.

Appellant commits a third error in building up its argument that title and possession were not proved, when he fails to note the relatively small quantum of proof required by the law of adverse possession of unimproved land. An example of what is sufficient proof of adverse possession of unimproved land is stated as follows:

(a) Recording deed;
(b) Surveying and staking land;
(c) Going upon land at intervals claiming ownership;
(d) Cutting timber and building short

brush fences on portion of land;
(e) Paying taxes.
Worthley v. Burbanks, 146 Ind. 534.
2 Wood on Limitations, Sec. 267.
Stuart, et al., v. U. Pr. R. R. Co., 178 Fed. 756.

,In the Stuart case in the Circuit Court of Appeals His Honor, Mr. Justice Van Devanter, then Circuit Judge, held that:

> *"In the courts of the United States* a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession, and this is so because there is a plain, complete and adequate remedy at law."
>
> "But it is also true that, in exceptional cases where there is no such remedy at law, the general rule does not apply. *In our opinion this is such a case."*

Note the indicia of adverse possession in the instant case, comporting with the foregoing authority:

(a) Appellant and predecessors filed deeds for record.
(b) Brought suit affecting title;
(c) Surveyed the land. "Surveyed in" the railroad, as witness said.
(d) At frequent intervals went on land claiming ownership, offering to sell it.
(e) Negotiated with Attorney Orahood,

for appellee railroad, attorney admitting no title in railroad to right of way, and offering to buy from petitioner.

(f) Petitioner and predecessors paid taxes on entire quarter section, including land upon which track rests, for more than forty years.

(g) Built fences.

(h) Conducted suits in the courts as to title to entire 160 acres.

4TH. *Railroad Assumed Color of Title Under Which It Claims Possession.*

Acts of Congress were not of themselves public notice constituting color of title to this land. They did not become public notice until the date of an act prescribing the finally adopted route. When the act occurred finally adopting the right of way over this land, we agree that then, and not before, said acts of Congress were public notice of color of title in the railroad company to this land.

Union Pacific R. R. Co. vs. Harris, 215 U. S. 389.

As is also said, pp. 7, 8, and 9, Reply Brief of Appellants, there was not in the Acts of Congress themselves any designation, description, location or limitation of the right of way over this land. It was a float at that time. Even after the railroad company finally adopted its route by actual construction in the year 1870, it could secure no color of title against the then owner of this

tract, Andy M. Adams, who was *insane* from January 4, 1867, to December 15, 1890, when the disability was removed.

5TH. RESOLUTION, *14* STATUTES, *P. 355,* SPECIFIES NO TIME FOR *DEFINITELY LOCATING.* LIMITS TIME OF COMPLETION.

This statute shows that the resolution contained nothing about definitely locating the Kansas Company line. By the resolution of May 7, 1866, the Kansas Company was given until June 27, 1866, to complete the first hundred miles (Appellee's Brief, p. 44; Appellants' Reply Brief, pp.

6TH. APPELLEE'S GRANT MUST BE SPECIFIC, NOT INFERENTIAL.

Since appellee can find no specific grant of right of way in the Act of July 2, 1864, it infers one. This Act of 1864 did not authorize the Union Pacific, Eastern Division, or Kansas Company, to build west of the 100th Meridian. It expressly limited the right to build westwardly to the specific roads named in said Act of 1864.

This Act of 1864:

(a) did not even authorize a line into Colorado.

(b) even if it did give power to condemn or authorize building of line, it did not grant a right of way;

(c) the grant of right of way must be clearly expressed and cannot be inferred.

Dubuque v. Litchfield, 23 Howard 66.
Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733.
(See more extended argument Appellants' Reply Brief, pp. 11, 12, 13, and 14.)

7TH. LAND GRANTED IN ACT OF 1864.

Appellee argues in his brief, at pp. 95-97, that no land is expressly granted by the Act of 1864. The land grant was enlarged by the amendments contained in Section 4. This section of the act gave more land, and we should say that it granted it expressly. (Appellants' Reply Brief, pp. 17, 18.)

Eastman's title dates from June 18, 1866. This is admited by the railroad company in its sworn answer. It is clearly proved by appellants' testimony. It is so found by the Circuit Court of Appeals, 178 Fed. 755-756. Appellee railroad can hardly reject its admissions or overturn this proof.

CONCLUSION.

We have indexed this brief for the convenience of Your Honors. It is not necessary to reiterate in conclusion as Your Honors can quickly turn to any subject considered, where the Court is interested in our argument, by reference to the index.

Therefore, we conclude briefly as follows:

1st. The passage of the Act of Congress of June 24, 1912, when construed in the light of the decision of this Court in the case of Northern Pacific Ry. Co. vs. Ely, 197 U. S., 1, and Northern Pacific vs. Hasse, 197 U. S.,

9, is absolutely decisive of the case at bar as to 300 feet of the right of way in question. The Act of 1912 itself preserves 100 feet for railroad purposes.

2nd. The doctrine of equitable estoppel is applicable to the instant case and the railroad company is estopped by the rules and principles of equity from now claiming more than has been actually used and is necessary to maintain and operate its railroad through this land. We should say that the evidence in the case shows that this width is not less than twelve feet nor more than fifty feet.

3rd. We agree with the main contention of appellants Stuart and Murray, that by no Act of Congress, 1862, 1864 or 1866, did the United States grant a right of way to the predecessor in title of the appellee railroad company in Colorado or west of the 100th Meridian. Especially is it contended that no right of way was granted or took effect prior to the initiation of title by the original entryman, Eastman, June 18, 1866.

4th. That appellants have proved adverse possession under the laws and judicial decisions in the State of Colorado. That their title is validated under the Act of 1912 to within fifty feet on each side of the center line of said railroad as now constructed through their land.

5th. That appellants have proved in this case abandonment of all of the right of way for railroad purposes except 100 feet. That again the Act of 1912 validates the titles of appellants and vests in them as the abutting owners all lands in said quarter section outside of a 100 foot strip.

6th. As a last word, we respectfully submit that if Your Honors shall hold with us in our contentions as to either the validity of the Act of 1912 or the application of the doctrine of equitable estoppel, that such decision will control in the Greeley case.

Respectfully submitted,

JOSEPH C. EWING,

Amicus Curiæ.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 435

Supreme Court, U. S.
FILED.
OCT 10 1910
JAMES H. McKENNEY,
Clerk.

THOMAS B. STUART AND CHARLES A. MURRAY,
PETITIONERS,

vs.

UNION PACIFIC RAILROAD COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

OPENING BRIEF AND ARGUMENT OF PETITIONERS.

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CHARLES A. MURRAY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 694.

THOMAS B. STUART AND CHARLES A. MURRAY,
PETITIONERS,

vs.

UNION PACIFIC RAILROAD COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

OPENING ARGUMENT OF PETITIONERS.

I.

We are unable to obtain satisfactory information as to whether we should place on file our opening argument along with the petition for the writ of certiorari, or await the action of the court on the application for the writ. But the action of the defendant in going fully into the case and citing the authorities it cited in the court below has persuaded us to place the

argument on file, to be considered by the court when the writ is granted, if it should be granted, or in connection with the consideration of the granting of the writ, as your honors shall deem proper.

We shall aim to approach the main points of contention as speedily as possible, first: by referring to the acts of Congress involved, and, second, by then examining the opinion of the Circuit Court of Appeals and pointing out the errors that we believe it contains.

As the facts have been briefly stated in the petition for the writ which we have printed, we shall not consume time by repeating them, but will refer to the facts that are applicable to special points as we examine such points. The acts of Congress, July 2, 1862 (12 Stats., page 489), and July 2, 1864 (13 Stats., page 356), are the only ones that are especially involved, as it is admitted by the Circuit Court of Appeals that our title was perfect prior to the passage of the act of 1866 and all subsequent acts. The act of 1866, however, and subsequent acts, throw light upon points of contention in reference to the act of 1864, upon which act alone the decision of the lower court was based.

We will now proceed to give quite a full abstract of the acts of Congress mentioned, hoping that by so doing we may materially lessen the labor of this court. Sections particularly involved we will quote in full. (Italics are ours.)

THE ACT OF JULY 1, 1862 (12 STATS., 489).

Section 1 gives names of incorporators and name of corporation as "The Union Pacific Railroad Company," with power to *lay out, locate,* furnish, construct and maintain a railroad from a point on the 100th meridian * * * between the south margin of the valley of the Republican and the north margin of the valley of the Platte, in the territory of Nebraska, to the western boundary of Nevada *upon the route* and terms hereafter provided. It has power to make by-laws, appoint agents, etc., touching the location of its railroad.

(*Note:* This is the main line running through Cheyenne and its grants and right of way have nothing to do with the case at bar.)

Sec. 2. "The *right of way* through all *public* lands be and the same is hereby granted to said company * * * 200 feet in width on each side of said railroad where it *may* pass over *public* lands."

Sec. 3. "That there be and is hereby granted to said company * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold or reserved or otherwise disposed of * * * and to which a pre-emption or homestead claim may not have attached at *the time the line* of said road is *definitely fixed.* Provided, that all mineral lands shall be excepted," etc.

Sec. 4. "That whenever said company shall have completed 40 consecutive miles of any portion of said railroad * * * the president of the United States shall appoint 3 commissioners to examine the same and report to him. And if it shall appear that 40 consecutive miles * * * have been completed, * * * *patents shall issue* conveying the right and title to said lands to said company on each side of

the road as far as the same is completed to the amount aforesaid, and *patents shall in like manner issue* as to each 40 miles," etc.

Sec. 5. "That * * * the secretary of the treasury shall upon the certificate of said commissioners of the completion of 40 consecutive miles * * * issue to said company *bonds* of the U. S. of $1,000 each * * * to the amount of 16 of said bonds per mile for such section of 40 miles" * * *

Sec. 6. "That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity," etc. * * *

Sec. 7. "That said company shall file their assent to this act * * * in the department of the interior within *one year* after the passage of this act and shall complete said road * * * before the 1st day of July, 1874. *Provided,* that within *one year* after the passage of this act said company shall designate the *general route* of said road as near as may be and *file a map* of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within 15 miles of said *designated route* or routes to be withdrawn from pre-emption, private entry and sale; and when any portion of said route shall be *finally located* the secretary of the interior shall cause the said lands herein before granted *to be surveyed* and set off as fast as may be necessary for the purposes herein named: *Provided,* that in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches as hereinafter provided."

Sec. 8. "That the line of said railroad and telegraph shall commence at a point on the 100th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, at a point to be fixed by the president of the United States, after

actual surveys; thence running *westerly upon the most direct, central and practicable* route through the territories of the United States to the western boundary of the territory of Nevada, then to meet and connect with the line of the Central Pacific railroad of California."

Sec. 9. "And be it further enacted that the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific railroad of Missouri, to the aforesaid point on the 100th meridian of longitude west from Greenwich, as herein provided *upon the same terms and conditions in all respects* as are provided in this act for the construction of the railroad and telegraph line first mentioned, and *to meet and connect* with the same at the meridian of longitude aforesaid; and, in case the *general route* or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure *northwardly* from the proposed line of the Kansas railroad *before* it reaches the meridian of longitude aforesaid, the *location* of said Kansas road *shall be made* so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river as aforesaid and the aforesaid point, on the *100th meridian of longitude,* that the several railroads from Missouri and Iowa *herein authorized to connect* with the same can make connection *within the limits* prescribed in this act, providing the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the 100th meridian of longitude to be subject to the approval of the president of the United States and to be determined by him on actual survey. And said Kansas Company may proceed to build said railroad to the

aforesaid point on the 100th meridian of longitude west from Greenwich, in the *territory of Nebraska.*"

The Central Pacific Railroad of California * * * are hereby authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco * * * to the eastern boundary of California upon the same terms and conditions in all respects as are contained in this act for the construction of * * * line first mentioned and to meet and connect with first mentioned road on the eastern boundary of California. *Each of said* companies shall file their *acceptance* of the conditions of this act in the department of the interior within *six months* after the passage of this act."

Sec. 10. "That said company chartered by the state of Kansas (L. P. & W. R. R.) shall *complete* 100 miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within *two years* after filing their assent to the conditions of this act as herein provided and 100 miles per year thereafter until the whole is completed."

The Central Pacific to complete 50 miles within two years, and 50 miles each year thereafter. And, after completing their roads, said companies or either of them may unite upon equal terms with the *first named* company in constructing so much of said railroad and branch railroads *in this act hereinafter* mentioned, through the territories from the state of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company.

And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri and the *first named* company or either of them, on the filing of their assent to this act as aforesaid, may unite upon equal terms under this act with the *Kansas* company in constructing said railroad to said meridian of longitude, with the consent of the state of Kansas; and in case the first named company shall complete

their line to the eastern boundary of California before it is completed across said state by the Central Pacific Railroad Company, said first named company is hereby authorized to continue through California with the consent of said state upon the terms mentioned in this act, until said roads shall meet and connect. * * * The Central Pacific Railroad * * * is authorized, after completing its railroad across the state, to continue the construction through the territories to the Missouri river, *including the branch roads* specified in this act upon *the routes* hereinbefore and hereinafter indicated, on the terms and conditions provided in relation to the Union Pacific Railroad Company, until said roads shall *meet and connect*, and the whole line of said railroad and *branches* is completed.

Sec. 11. Aid in bonds trebled for mountainous part of the road.

Sec. 12. That whenever the route of said railroad shall cross the boundary of any state or territory or *said meridian*, the two companies meeting or uniting there shall agree upon its location at that point with reference to the most direct and practicable through route—the President of U. S. to be final arbiter. The companies named in each state and territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of road and branches shall be of uniform width * * * so that when completed cars can be run from the Missouri river to the Pacific coast. * * * The whole line of said railroad and branches shall be operated and used as * * * *one connected* and continuous line; and the companies herein named in Missouri, Kansas and California *filing their assent to the provisions of this act* shall receive and transport all iron rails, etc., etc., and all material required for constructing and furnishing the first mentioned line *between* the aforesaid point on the 100th meridian * * * and

the western boundary of Nevada whenever the same is required by said first named company, at cost, over that portion of the road of said companies constructed under the provisions of this act.

Sec. 13. That the Hannibal & St. Joseph R. R. Co. of Missouri may extend its road from St. Joseph via Atchison, to connect and unite with the road through Kansas (L. P. & W. R. R.) upon filing its assent to the provisions of this act *upon the same terms and conditions* in all respects for 100 miles in length next to the Missouri river as are provided for the construction * * * of first mentioned line * * * *Provided*, that if * * * desirable it may * * * construct on the most direct and practicable route west from St. Joseph, so as to connect and unite with the road from the western boundary of Iowa at a point *east* of the 100th meridian, or with the *main trunk* road at said point. But in no event shall lands or bonds be given to said company for a greater distance than 100 miles. And the L. P. & W. R. R. may construct their road *from Leavenworth* to unite with the road through Kansas.

Sec. 14. That the said Union Pacific Railroad Company is hereby authorized and *required* to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States, upon the most direct and practicable route * * * so as to form a connection with lines of said company at some point on the *100th meridian* aforesaid * * * on the same terms and conditions, etc., etc.

* * * * * * *

And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the Pacific R. R. Co. is hereby authorized and *required* to construct a railroad from Sioux City upon the most direct and practicable route, so as to connect with the branch railroad * * * in this section mentioned, or with the said Union Pacific R. R.

* * * not further west than the 100th meridian, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad * * * provides for forfeitures in case it fails to build this Sioux City branch.

Sec. 15 provides that other companies may unite upon such equitable terms as the president of the United States may prescribe.

Sec. 16. Companies named *herein* and assenting to this act may consolidate, etc.

Sec. 17. Companies failing to comply with the provisions of this act by completing their roads, etc., etc., are liable to forfeit rights.

Sec. 18. When the net earnings exceed 10 per cent., etc., Congress may reduce rates.

"And the *better to accomplish the object of this act* * * * Congress may at any time, *having due regard for the rights of said companies named herein*, add to, alter, amend or repeal this act."

Sec. 19. The principal road and branches may contract with existing telegraph companies, etc.

Sec. 20. "That the corporation hereby created and the roads *connected therewith*, under the provisions of this act, *shall* make to the secretary of the treasury an *annual report*, wherein shall be set forth:

First: * * *

Second: * * *

Third: * * *

Fourth: *A description of the lines of road surveyed of the lines* FIXED UPON *for the construction of the road*, etc. * * * which report shall be *sworn* to by the president of the said company and shall be presented to the secretary of the treasury on or before the first day of July in *each year*."

[Note: *This act clearly constitutes a compact and binding agreement between the United States and the several different roads mentioned, and a compact and agreement between each road and every other road mentioned, that even Congress could not vary; for section 18 provides that its power to amend the act is confined to* "BETTER ACCOMPLISH THE OBJECT OF THE ACT, * * * HAVING DUE REGARD FOR THE RIGHTS OF SAID COMPANIES named herein."

One right of each of the companies named was, upon completion of their line, to enter upon the construction of the entire system upon equal terms with all other companies.

Another right each company was secured in was that all of the eastern branches should build west to the 100TH MERIDIAN AND NO FURTHER. The right of way and all other grants of these branches was to extend to that point and NO FURTHER. This was important to every road that accepted of the act, and upon it rested the hope of constructing a through line from the 100th meridian west. Upon this agreement the different roads expended millions of dollars. The government issued bonds, which were more than ample to pay all cost of original construction, and gave large subsidies in lands.

These matters are important to be remembered when we consider subsequent acts of Congress.]

THE ACT OF JULY 2, 1864.

(13 Stats., page 356.)

Sec. 1. Shares of stock in Union Pacific to be $100 instead of $1,000, as provided in the act of 1862.

Sec. 2. Books of subscription to be kept open in cities—Subscribers must pay as much cash as those who have already subscribed—Stock to be based on actual cash value.

Sec. 3. That the Union Pacific and *all other companies* provided for in *"this act and the act to which this is an amendment"* are given the right to condemn for *"right of way,"* etc.

[*Note:* That is, the Union Pacific to condemn along its line and the *branches along their respective lines up to the 100 meridian.*]

Sec. 4. That section 3 of "said act" be amended by striking out "five" wherein the same occurs in said section, and inserting in lieu thereof "ten." And where "ten" occurs, strike out and insert "twenty."

And section 7 of "said act" be amended by striking out "fifteen" and inserting "twenty-five." The term mineral land wherever it occurs in *"this act and the act to which this is an amendment"* shall not embrace coal or iron land. And any lands granted by *"this act or the act to which this is an amendment."* * * * And any lands granted by *"this act or the act to which this is an amendment"* shall not defeat a homestead or other prior filing, etc. * * * *Provided,* that the quantity of timber exempted to settlers by *"this act and the act to which this is an amendment,"* etc., shall not apply to timber * * * farther than 10 miles from center line of any one of said roads or "branches" mentioned in *"said act or in this act"* * * * And all land shall be excluded from the operation of *"this act and the act to which this act is an amendment"* which were located for colleges, etc.

Sec. 5. "That the time for designating the *general route* of said railroad and *filing the map* of the same, and the time for the completion of that part of the railroads required by the terms of said act of *each company* be and the same is hereby extended *one year* from the time in *'said act'* designated."

Sec. 6. "That the provision of section 4 of *'said act'* (relating to president appointing commissioners) is hereby modified, etc. * * * They shall make report to the president as provided by *'the act to which this is amendatory.'* * * * And such statement (of California line) may be filed, examined and the requisite amount of *bonds* issued, lands set aside, located, entered and patented as provided in *'this act and the act to which this is amnedatory,'* upon the construction by said railroad company of California * * * of not less than 20 consecutive miles * * * upon the report of the commissioners that such portion is completed as required by *the act to which this is amendatory.'* And section 10 of *'the act of which this is amendatory'* is amended by inserting after the words 'United States' * * * the words 'and states intervening.' "

Sec. 7 (in full). "That so much of section 17 of said act as provides for a reservation of the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed. And any failure of any one company to comply fully with the conditions and requirements of *'this act and the act to which this is amendatory'* shall not work a forfeiture of the rights and privileges or franchise of any other company or companies that shall have complied with the same."

Sec. 8. Relates to the issue of bonds for the Rocky Mountain district. The act of 1862 is referred to as *"the act"* and *"said act."*

Sec. 9 (in full). "And be it further enacted that to *enable* any one of said corporations (Note: see section 5) to make *convenient* and necessary connections with other roads, it is hereby authorized to establish and maintain *ferries* upon and across the Missouri river and *other* rivers, which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and *other* rivers, for the convenience of said road. *Pro-*

vided, that any bridge or bridges it may construct over the Missouri river, or any other navigable river, on the line of said road shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept and maintained at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do."

[*Note:* Thus far this section relates to railroads mentioned in the act of 1862.]

"*And, provided, further,* that any company authorized by THIS ACT to construct its road and telegraph line from the Missouri river to the initial point aforesaid,

[*Note:* The new Sioux City Railroad (section 17) and the Burlington and Missouri River Railroad (section 18) are the only two railroads authorized by *"this act"* to construct from the Missouri river to the initial point aforesaid, etc.]

may construct its road and telegraph line so as to *connect* with the Union Pacific at any point *westwardly* of such initial point, in case such company shall deem such westward connection more *practicable or desirable;* and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the *benefits* and subject to all the conditions and restrictions of *this act.*

[*Note:* The defendant, in pleading this section, adds to the words "this act", "AND OF THE ACT AMENDED THEREBY," which is a serious perversion.]

Provided further, however, that no *bonds* of the United States shall be issued to such company for a greater amount than is *hereinbefore* provided"

(see section 17), if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall *such* company be entitled to receive any greater amount of alternate sections of public lands than are also *herein* provided."

Note: (a) It is evident from the reading of the whole section that it was not aimed for any other purpose than to provide for the *convenient* connection of certain branch roads with the main trunk line at or near the *100th meridian.* It did not turn said branches at large, to unite with the Union Pacific Railroad at any point along its line westward to the California line.

(b) The Act of 1862 granted to certain branches therein named the right of way *only to the 100th meridian,* and not west of that (through public lands). The Act of 1864 does not *give* or *extend* any right of way to any branch road beyond the 100th meridian. It takes an express provision of the statute to grant a right of way. It is wholly independent of other grants.

(c) The Act of 1862 referred solely to the right of way through *public* lands. The Act of 1864 refers solely to condemnation of right of way through *private* lands. The meaning of the Act of 1862 was to grant to certain branches therein named the right of way through *public* lands to the *100th meridian,* but no further. The meaning of the Act of 1864 was to give said branches the right to *condemn* the right of way through *private* lands to the *100th meridian,* and nothing more.

(d) The permission to build westwardly was not given to *all* branches, but only such as were made branches by "this act"—1864. This is also shown by section 12.

Sec. 10. That section 5 of said act be so modified and amended that the U. P. Company, or any other company authorized to participate in the construction of said road, may, upon the completion of each section of said road as provided in *"this act and the act to which this act is an amendment,"* etc. * * * And the lien of U. S. bonds shall be subordinate * * * except as the provisions of the 6th section of *"the act to which this act is an amendment,"* etc.

Sec. 11. That if any of the railroad companies entitled to bonds of the United States * * * has at the time of the approval of *"this act,"* etc., * * * Provided, that no land granted by *"this act"* shall be conveyed * * * and no bonds shall be issued * * * on account of any road or part thereof made prior to the passage of *"the act to which this act is an amendment,"* or made subsequent thereto under the provisions of any *"act or acts other than this act, or the act amended by this act,"* etc.

Sec. 12 (in full.) *And be it further enacted:* That the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, *shall* build the railroad from the mouth of the Kansas river by way of Leavenworth, or, if that be not deemed the best route, then the said company *shall*, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of its said branch the said company shall not be entitled to any bonds. *And if the Union Pacific Railroad Company* shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific, eastern division, shall have *completed their road to the 100th degree of longitude*, then the last named company may proceed to make said road westward until it meets and *connects* with the *Central Pacific Railroad Company* on the same line. And

the said railroad from the mouth of the Kansas river *to the 100th meridian* of longitude *shall be made* by way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns; *Provided,* that *no bonds* shall be issued or *land* certified by the U. S. to any person or company for the construction of any part of the main trunk line of said railroad (U. P.) west of the *100th meridian* of longitude, and east of the Rocky mountains, until said road shall be completed from Omaha, on the Missouri river, to the 100th meridian.

[*Note:* This section shows that the act of 1864 contemplated no change whatever in the formerly designated and adopted route of the L. P. & W. R. R. It was still required to build to a connection with the U. P. at the 100th meridian, and when it arrived at that point if the U. P. was in default it could take possession of the U. P.'s right of way, etc., and build on to a connection with the *Central Pacific* at the California line.]

Sec. 13 provides for 15 directors for the Union Pacific—their duties.

Sec. 14. Directors shall hold office for one year and meet in New York.

Sec. 15. That the several companies authorized to construct the aforesaid roads are required to operate and use them "as one continuous line."

[Note: This refers solely to the companies "authorized," etc., by the act of 1862.]

Sec. 16. That any two or more companies authorized to participate in the benefits of *this act* may at any time unite and consolidate as a new company, retaining the rights of each—mode of procedure given. The consolidated company shall receive all and singular the grants, *benefits,* immunities, acts and things to be done and be subject to the same terms, conditions

and restrictions * * * which said companies respectively, at the time of such consolidation, may be entitled or subject to, under *"this act,"* and all provisions of *"this act"* shall apply, etc., * * * may construct under *"the provisions of this section"* and have all the *benefits* thereof. May be more than one consolidation pursuant to *"this act."* Central Pacific may extend its line, complying in all respects with the provisions and the sections of *"this act."*

Sec. 17. *And be it further enacted:* that so much of section 14 of *"said act"* as relates to a branch from Sioux City be, and the same is hereby, amended to read as follows:

It then provides for the creation of a company which shall construct and operate a line of railroad from *Sioux City* upon the most direct and practicable route to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad (main line), as such company may select, and on the *same terms and conditions as are provided in "this act and the act to which this is an amendment."* * * * That Union Pacific is hereby *released* from the construction of said branch (see section 14, Act of 1862). * * * And said company constructing said branch shall not be entitled to receive in *bonds* any larger sum than the said Union Pacific Company would be entitled to receive if it had constructed the branch under *"this act and the act to which this is an amendment,"* but said company shall be entitled to receive alternate sections of land for 10 miles in width on each side of the same along the whole length of said branch: *And provided further*, that, if a railroad should not be completed to Sioux City across Iowa or Minnesota within 18 months from the date of *"this act,"* then said company designated by the president as aforesaid may commence, continue and complete the construction of said branch as contemplated by the provisions of *"this act."* *Provided, however*, that if the said company so designated by the president shall not complete the

said branch from *Sioux City* to the Pacific Railroad within 10 years from the passage of *"this act,"* then and in that case all of the railroad which shall have been constructed by said company shall be forfeited to and become the property of the United States."

[Note: This is an entirely new company brought in by the act of 1864.]

Sec. 18. And be it further enacted that the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the state of Iowa, is authorized to extend its road through the country of Nebraska from the point where it strikes the Missouri river south of the mouth of the Platte river to some point *not further west* than the 100 meridian so as to connect by the most practicable route with the main trunk of the Union Pacific Railroad or that part of it which runs from Omaha to the said 100 meridian. And for the purpose of enabling said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized *the right of way* through the public lands is hereby granted to said company for the construction of said road. And the right, power and authority is hereby given to said company to take timber, etc. * * * from adjacent public land. The right of way granted is *200 feet* in width when it may pass over public land.

Note: This is an entirely new road brought in by the act of 1864, and its acts, duties and benefits are prescribed solely by sections 18, 19, 20, 21 of this act. Its right of way was limited to 200 feet.]

Sec. 19. That for the purpose of aiding in the construction of said road there is hereby granted to the said Burlington and Missouri River Railroad Company every *alternate section* of land * * * designated as odd sections for the amount of 10 alternate sections per mile on each side of said road * * * *Provided*, That said company shall accept this grant

within one year from the passage of *"this act,"* by filing its acceptance with the secretary of the interior, and shall also establish *the line* of said road *and file map thereof* with the secretary of the interior within one year from the date of its acceptance, when the said secretary shall withdraw the lands embraced in this grant from the market.

Sec. 20 provides for the issuance of patents as the lands are earned. * * * The president shall appoint commissioners, etc., as provided in relation to *other* roads mentioned in *"the act to which this is an amendment* * * * the said company shall be entitled to the privileges and immunities granted to the Hannibal and St. Joseph Railroad Company by *"the last mentioned act,"* so far as the same may be applicable, *Provided,* that no *bonds* shall be issued to the B. & M. R. R. Co., and provided, said extension shall be completed within 10 years from the passage of this act.

Sec. 21. *And be it further enacted,* that, before any land granted by *"this act"* shall be conveyed to any company * * * entitled thereto under *"this act,"* there shall first be paid the costs of surveying, etc.

GENERAL REMARKS ON THE ACT OF 1864.

In the act of 1864 reference is made to acts of Congress *forty-three times.* The words *"this act"* (always referring to the act of 1864) are used *eleven* times. The words *"said act"* (always referring to the act of 1862) are used *ten* times. The words *"this act and the act of which it is an amendment"* (referring plainly to the acts of 1862 and 1864 combined) are used *fourteen* times. The words *"Provided by the act to which this is an amendment"* (referring to the act of 1862) are used *twice.* The words "Herein

provided" (referring to act of 1864) are used *once.* The words *"Any act or acts other than this act, or the act amended by this act"* (excluding affirmatively both acts) are used *once.* The words *"the last mentioned act"* (being the act of 1862) are used *once.*

The above terms are used with care, definiteness and precision, and if we do Congress the justice of granting that it meant what it said, and said what it meant, no difficulty arises in construing and applying the act.

THE ACT OF JULY 3, 1866.

(14 Stats., 79.)

The act is short and we quote it in full:

Sec. 1. *Be it enacted:* That the Union Pacific Railroad Company, eastern division, is hereby authorized to *designate* the *general route* of their said road and to *file map* thereof as now required by law at any time before the 1st day of December, 1866; and upon *the filing* of the said *map,* showing the general *route* of said road, the lands along the entire line thereof, so far as the same *may be designated,* shall be *reserved* by order of the Secretary of the Interior. *Provided,* that said company shall be entitled to only the same amount of *bonds* of the United States to aid in the construction of their said line of railroad and telegraph as they would have been entitled to *if they* had connected their said line with the Union Pacific Railroad on the 100th degree of longitude AS NOW REQUIRED BY LAW. *And, provided,* further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than *fifty* miles westwardly from the meridian of Denver, in Colorado.

Sec. 2. *And be it further enacted:* That the Union Pacific Railroad Company, with the consent

and approval of the Secretary of the Interior, are hereby authorized to *locate, construct* and continue their said road from Omaha, in Nebraska, westward according to the best and most practicable route and *without reference to the central point* on the 100th meridian of longitude, *as now provided by law,* in a continuous completed line, until they shall *meet and connect* with the Central Pacfiic Railroad of California; and the Central Pacific Company, with the *consent* and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road eastward until they shall meet and connect with the Union Pacific Railroad. *Provided,* that each of the above named companies shall have the right, when the nature of the work to be done, by reason of deep cuts and tunnels, shall, for the expeditious construction of the Pacific Railroad require it, to work for an extent of not to exceed 300 miles in advance of their completed lines."

THE ACT OF MARCH 3, 1869.

(15 Stats., p. 324.)

Sec. 1. The Union Pacific Railroad, eastern division, is hereby *authorized* to contract with the Denver Pacific Railway, a corporation under the laws of Colorado, for the construction of its line *between Denver City* and its point of connection with the Union Pacific Railroad at *Cheyenne,* etc.

Sec. 2. That the * * * eastern division *shall extend* its railroad to a connection at the *city of Denver,* so as to form a continuous line from *Kansas City,* by way of *Denver,* to *Cheyenne.*

Sec. 3. The said corporations are authorized to mortgage, etc., etc., * * * and that each of said companies *shall receive patents* to the *alternate sections* of land along their respective lines of road, as herein defined, *in like manner and within the same limits as is now provided by law* in the case of *lands*

granted to the Union Pacific, eastern division. Neither of the companies shall be entitled to subsidy in United States bonds under the provisions of this act.

HEREIN OF THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS AS TO THE FILING OF MAPS OF DEFINITE LOCATION OR OBTAINING RIGHTS BY ACTUAL CONSTRUCTION: THE CONSTRUCTION THAT MUST BE GIVEN GRANTS AND AS TO WHEN THE RIGHT OF WAY ATTACHES.

The Supreme Court of the United States, in 97 U S., 491, gives a history of the defendant and its filings of maps and lines of location under each act up to 1869, but not including that year. The opinion relates to subsidy lands. The grant of these lands and the grant of right of way are distinct grants (R. R. vs. Baldwin, 103 U. S., 428).

But the grant of subsidy lands must be finally based upon and governed by the right of way that is definitely located. The subsidy lands in question were entirely within the State of Kansas and east of the 100th meridian. They would, therefore, be covered by the act of 1862. The act of 1864 did not grant anything to the defendant west of the 100th meridian. It did enlarge its subsidy land grant east of it.

The defendant under the act of 1864, in accordance with its rights thereunder and up to that time, *filed, as is shown by the opinion, its map extending up the Republican river to the 100th meridian.* This map was not approved of by the president, and nothing more was done until the act of 1866 became a law and the defendant acted thereunder, by filing a map on the ..... day of July, 1866, showing its

general line from *Fort Riley to the western boundary of Kansas and no further.*

We have shown that this act of 1866 being passed subsequent to the initiation of our title could not affect us; but the act itself and the doings of the defendant thereunder are, neither one, of the character that is claimed by defendant for them, as we have heretofore shown. Even had our filing been made after this map was filed to the western line of Kansas, such a filing could not affect our rights.

The act of 1866 required the defendant to file map of definite location by December 1, 1866. The only one it ever filed was to the western boundary of Kansas. The time for filing map has never been extended.

The United States Supreme Court, in 148 U. S., page 724, continues the history of the K. P. road grants down to and including the acts of 1869 and 1874. The decision refers solely to the land grant and does not speak of any right of way, except as it refers to maps of *definite location.* It will be noticed that the facts stated and our contentions as to the acts are in harmony. That our claim as to the "right of way" is the correct one.

Note—(a) The act of 1864 is spoken of as simply *increasing* the amount of land granted to the respective roads within the limits of their grants, i. e., the K. P. from the Missouri river *up to the 100th meridian.*

(b) The act of 1866 is spoken of as being permissive of the change of line of its definite location to a point 50 miles west of the meridian of Denver. The *bill* alleges that after the passage of the act of July 3, 1866, the K. P. Company did change its line so as to build in a direct line to Denver, but the *date* of this new location is not given in the bill. The bill does state, however, that before the line was completed to Denver, the act of March 3, 1869, was passed (which really gave the K. P. the subsidy lands in Colorado).

This act for the first time made it the duty of the K. P. to build to Denver.

(d) It is said that the K. P. became entitled to these subsidy lands from "the moment it proceeded under the act of 1866 *to establish its line of definite location* so as to make the same extend * * * to Denver."

(e) The opinion says: "In addition to all of this, the facts set forth in the plea of Joseph Standley which for the *"purpose of this case"* may be taken as true * * * set forth that in compliance with the act of 1866 the (K. P.) *filed* with the secretary of the interior *a map* of the *general route* of its line from the *Western boundary of Kansas through Denver* to Cheyenne; * * * that this map of the general route *was the only one ever filed;* * * * that on *May 26th, 1870,* the Kansas Pacific also *filed its* map of *definite* location between the boundary line of *Kansas and Denver,* which was approved by the secretary of the interior, that under his direction the commissioner prepared maps showing the limits of the land grants, etc."

Note: The truth is that no map of any kind was ever filed, as shown by the evidence in the present case. The statement of Standley that was taken as true for the purposes of that case, shows, however, that none was filed prior to May 26, 1870, and this would bring the filing of it under the act of 1869.

We have ever contended that the K. P. obtained its subsidy lands (west of the 100th meridian) by virtue of that act. If it was entitled to them under the provisions of any or all the acts of prior date there *would have been no necessity for the act of 1869.*

While the act of 1869 gave to it these subsidy lands, there is no act that ever gave to it *any right of way,* from the 100th meridian west.

But if it be conceded that defendant got a "right of way" by this map, through *public* lands, it will be noted that our land was patented to us about four

years prior to such date. Our land was not "public" land after June 18, 1866.

THESE GRANTS MUST BE STRICTLY CONSTRUED AGAINST THE DEFENDANT.

In *Leavenworth R. R. vs. United States*, 92 U. S., 733, it is said (page 740):

"All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress * * * must be plainly expressed in the statute, and if not expressed, they cannot be implied." (Quoted from 23 How., 66.) * * *

"This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning nor diminished by strained construction. * * *

"If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor. In other words: *What is not given expressly or by necessary implication is withheld.* * * *

"But these grants have always been recognized as attaching only to so much of the *public* domain as was subject to sale. * * * Such grants could not be otherwise construed, for Congress cannot be supposed to have thereby intended to *include land previously appropriated to another purpose,* unless there be an express declaration to that effect. A special exception was not necessary, because the policy which dictated them confined them to land which Congress could *rightfully* bestow without disturbing *existing relations and producing vexatious conflicts.* * * *

(P. 745.) "We go further and say that whenever a tract of land shall have been once legally appropriated to *any purpose* from that moment the land * * * becomes severed from the mass of *public* lands; and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it. * * * (P. 748.) Private entries, preemption and homestead settlements continued," etc. * * *

Approved in *Newhall vs. Sanger*, 92 U. S., 762.

In *Jackson vs. Dines*, 13 Colo., 90, it is said:

"The rule has been frequently expressed that all grants of this description are *strictly construed* against the grantees and nothing passes but what is conveyed by clear and explicit language."

Dubuque & Pacific R. R. Co. vs. Litchfield, 23 How., 66.

Hannibal & St. J. R. R. vs. Mo. R. Packet Co., 125 U. S., 271.

Oregon Ry. & N. Co. vs. Oregon Co., 130 U. S., 26.

Newton vs. Mahoning Co., 10 Ohio, 548.

Fertilizing Co. vs. Hyde Park, 97 U. S., 659.

U. S. vs. Oregon Co., 164 U. S., 526.

North Pac. R. R. vs. Saunders, 17 U. S. Sup. Ct., 671.

Munroe Cattle Co. vs. Becker, 147 U. S., 57.

Northern L. Co. vs. O'Brien, 139 Fed., 614.

Broder vs. Water Co., 101 U. S., 276.

Whitney vs. Taylor, 158 U. S., 85-91.

N. L. R. R. vs. McCormick, 89 Fed., 659.

Radke vs. Winona R. R. Co., 43 N. W., 967.

WHEN DOES THE RIGHT TO RIGHT OF WAY ATTACH?

The first case determined was *Railroad Co. vs. Baldwin*, 103 U. S., 426, which held that under the facts of that case the right to right of way attached as of the date of the act.

The peculiar facts of this case that are not found in later decisions are:

1st. That the initial point and terminus of this road, with at least one intermediate point, were definitely fixed in the act itself.

2d. An examination of the route (see map) shows that the entire length of the line was across some 4 to 6 counties in Kansas, with an intermediate point named.

3d. That Baldwin made his filings subject to the rights so acquired by the railroad and that Baldwin had never received a patent.

4th. The company had filed all maps required of it; in fact there were no requirements made of it by the act, such as are found under the act of 1862, Sec. 20.

5th. The grant of the right of way is stated to be a distinct and independent grant under that act.

Many exceptions have been made to the broad rule of the Baldwin case. In *Jackson vs. Dines*, 13 Colo., 90, it is said on page 95:

"In Railroad Company vs. Baldwin, 103 U. S., 426, the language of the act was substantially the same as in the case now under consideration and the *route* specified in the act was from *'Elwood in Kansas westwardly via Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad or a branch thereof not further west than the 100th meridian of west longitude.'* In that case it was held by Mr. Justice Field, delivering the opinion of the court, that the grant of the right of way was 'a present absolute grant subject to no conditions except those *necessarily implied*, such as that the road

should be constructed and used for the purposes designed.' It was further held 'that all persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road.' * * * The initial and intermediate points are distinctly specified, and the general direction outlined, in the act of Congress granting the right right of way to the Denver & Rio Grande Company specifies neither terminal nor intermediate points nor general direction, except as it may be inferred from the fact that the road already had its northern terminus at Denver and its southern at Pueblo and Canon City, and that the grant was for *'the extension* and operation of its railway and telegraph lines in and through *any contiguous territory* of the United States *to the northern boundary line of Mexico.'* * * *

"Notwithstanding the very liberal and favorable constructions which have been given to various acts of Congress granting rights of way over the public domain to the railroad companies, we know of no opinion *going so far as to hold that such grants should be construed to include routes not contemplated by the charters of the companies at the time of the grant, and we are unwilling to be the first to set such a precedent.* The rule has been frequently expressed that all grants of this description are strictly construed against the grantees and nothing passes but what is conveyed in clear and explicit language. *Charles River Bridge vs. Warren Bridge,* 11 Pet., 420; *Railroad Company vs. Litchfield,* 23 How., 88; *Gildart vs. Gladstone,* 11 East, 675."

The filing of a map of definite location or the actual construction of the road is required.

Newell vs. Killie, 17 Colo., 88.

Railroad Co. vs. Hanorum, 19 Colo., 162.

D. & R. G. vs. Wilson, 28 Colo., 6.

Bonner vs. R. R., 31 Colo., 446.

The Circuit Court of Appeals of this (Eighth) circuit has determined that such a grant takes effect from the date of filing map of *definite location* (or actual *construction*).

Smith vs. Nor. Pac. R. R., 58 Fed., 513.
N. P. R. R. vs. Smith, 69 Fed., 57.
N. P. R. R. vs. Smith, 18 Sup. Ct., 794.

It will be noticed that the Supreme Court does not differ with the lower court on the question of the right of way attaching only when *map of definite* location is filed, but holds *actual construction* before any filings made by others may take the place of the map.

From the facts found by the Supreme Court it appears that a land company took possession of a tract as a town site, but filed no plat thereof for about two years. It seems that no filings whatever were ever made by it in any government land office. In the meantime the railroad company constructed its line across the tract and claimed title to a strip 400 feet wide for *right of way*. The plaintiff Smith claims under the town company, and his title may be briefly stated as follows:

1st. The town company took possession of and surveyed the tract prior to June 20th, 1872.

2d. The township was surveyed in October, 1872, and a plat thereof filed in the general land office in March, 1873.

3d. The town company recorded a plat of the town with the county recorder in February, 1874.

4th. The land was patented to the town company (mayor) July 21st, 1879.

The railroad claims: 1st. Right of way, under act of Congress of July 2d, 1864. 2d. It surveyed its line and filed plat thereof in the general land office February 21st, 1872. The line surveyed passed ¾ of a mile south of this land and some grading was done thereon in 1872.

3d. During the year 1872 the present line was staked across this tract and it was *graded* in the spring

of 1873 by the railroad and completed and accepted by the government. The line of its road south was abandoned.

The court holds: (a) The act of Congress, July 2nd, 1864, granted the right of way 400 feet wide.

(b) The railroad relied upon such grant and *constructed* its road in 1873 (before any filings of any kind had been made by the town company).

(c) Report was made by the company of this line and it was approved by the government December 1st, 1873 (before any filing of any kind was made by the town company).

The court says:

"Undoubtedly there was thus disclosed a *prima facie* title and right of possession in the company."

"If in 1873, when the railroad took possession of the tract and *constructed* its road over the same, it *was then* a part of the *public lands* of the United States, no one but the United States *could complain* of the change of its lines. The United States did not object, but approved and accepted this as part of the road."

"The land in question was at *that time* part of the public domain unless the occupation of the land company, which afterward obtained a patent, etc. * * * It has frequently been held that *mere occupation* and improvement with a view to pre-emption do not confer a *vested right* in the land so occupied; that such a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receivers' receipt issued."

Note—Part of this language is hardly consistent with language used by the same judge (Shiras) in another case—16 Sup. Ct., 219—but this does not affect us. If the railroad's title is to date from the filing of map of *definite location* or *actual construction*, our title antedates that of the railroad some four years.

"The railroad, to acquire the benefit tendered by the act of 1864, constructed its road. By accepting the offer of the government it obtained a grant of the *right of way.*"

"It may be conceded, but not decided, that when it changed its route, it lost its priority under the grant of 1864 as against subsequent grantees of the United States, who obtained title before the actual construction of the railroad, and that it could only legally proceed under its right of eminent domain. *"But this action of ejectment cannot be maintained against it."*

Justices Gray and White concur insofar as to hold the railroad title sufficient. *Harlan, J.*, dissents. *Brewer, J.*, concurs specially, holding the railroad entitled to the 25 feet only actually occupied, and that the legal title by the patent to the town site company must prevail.

See, also,

Lilienthal vs. So. Cal. R. R., 56 Fed., 710.

Spokane Falls vs. Ziegler, 61 Fed., 392.

Washington & R. R. Co. vs. Osborn, 16 Sup. Ct., 219.

Leavenworth R. R. vs. U. S., 92 U. S., 733.

Minn. & St. Paul R. R. vs. Doughty, 28 Sup. Ct., 291.

Wash. & I. R. R. vs. C. D. R. R., 60 Fed., 981.

Nor. Pac. vs. Sanders, 17 Sup. Ct., 671.

St. Paul & P. R. R. vs. N. P. R. R., 11 Sup. Ct., 393.

Munroe Cattle Co. vs. Becker, 147 U. S., 57.

Ard vs. Brandon, 156 U. S., 537.

Northern L. Co. vs. O'Brien, 139 Fed., 614.

Slaght vs. N. P. R. R., 81 Pac., 1063.

Broder vs. Water Co., 101 U. S., 276.

Western Pac. R. R. Co. vs. Lewis, 41 Cal., 489.

Doughty vs. M. & St. P. R. R., 107 N. W., 971.

Weise vs. U. P. R. R., 108 N. W., 175.

O. S. R. R. Co. vs. Quigley, 80 Pac., 401.
Me. St. C., Etc., R. R. vs. Doughty, 28 Sup. Ct., 291 (1907).
Whitney vs. Taylor, 158 U. S., 85-91.
Piers vs. Deluchi, 26 Pac., 228.
N. P. R. R. vs. McCormick, 89 Fed., 659.
Weeks vs. Bridgeman, 43 N. W., 81.

56 *Fed.,* 710, *supra,* concerns a *right of way* under the act of 1875. Sec. 4 required a *profile* of the road to be filed within 12 months, etc. Plaintiff settled on the land July, 1885; filed declaratory statement September 20th, 1885; made final proof September 1st, 1886; obtained patent March, 1890.

Defendant (railroad) prior to plaintiff's settlement, April 24th, 1885, filed with land office a claim for the land as station grounds. The map of this land was held by the secretary, but road informed it had not filed map showing its *right of way.* September 30th railroad filed map showing definite location of its line, which was approved December 31st, 1885; the map for station grounds, before filed, was approved.

Thus we see that the right of way act was passed more than 10 years prior to the plaintiff's settlement and filing. (The requirement for the filing of a map of *definite location* is no more positive under this act than it is under the act of 1862, Sec. 20.) The filing of the map claiming station grounds was made some 5 or 6 months before inception of plaintiff's title, but the map of *right of way* was filed 18 days after plaintiff had filed his pre-emption. The court says, p. 704:

"His (plaintiff's) settlement initiated a right which was followed up by final proof and payment for the land, in consideration of which the government issued to him, as has been seen, its certificate of purchase and subsequently its patent, which latter related back to the date of his settlement and perfected in him the title as of that date. The trouble with the railroad company is that it did not pursue the provisions of the

law which are plain enough * * * As already observed the grant contained in the act of Congress of ground for station purposes is of ground adjacent to the *right of way*. Before any right can arise out of such a grant, the *right of way* must be secured, which can only be done by complying with the provisions of the law conferring it * * * The doctrine of Yosemite Valley case, 15 Wall., 77, does not aid the defendant. In cases like the present the *first in time* in commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

Shepley vs. Cowan, 91 U. S., 338.
Sturr vs. Beck, 133 U. S., 550.

61 Fed., 392, *supra:* "Act of March, 1875, granting *right of way* through public lands * * * does not entitle the company to a right of a pre-emptor who has made final proof, tendered purchase money and demanded final receipt. * * *

Sec. 4 is that *after* the *profile* of the road has been filed all lands over which the *right of way* shall pass shall be disposed of subject to such right of way. Lands therefore which have been disposed of theretofore were exempt. The pre-emption laws are certainly a means of disposing of the public lands and an entry of record under them, valid on its face, is such an appropriation of the tract entered as segregates it from the public domain and precludes it from subsequent grant."

R. R. Co. vs. Whitney, 132 U. S., 357.
Sturr vs. Beck, 133 U. S., 541.

An express reservation not necessary.

Wilcox vs. Jackson, 13 Pet., 498.
Leavenworth R. R. vs. U. S., 92 U. S., 733.

16 *Sup. Ct.*, 219, *supra:* The question as to the rights of pre-emptors, or those who had properly filed *any claim* recognized under the laws of the United

States, as against railroads seeking to take the land for *right of way*, would seem to be forever settled by the following language in this case:

"It would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their road at pleasure, regardless of the rights of settlers."

Note—In this case, Osborn had never made any filing of any kind.

28 *Sup. Ct.*, 291, *supra:* Either the *filing of map*, or the *actual construction* of road preserved right of railroad under the act of 1875.

60 *Fed.*, 981, *supra:* A railroad which surveys an extension of its line beyond the *terminus fixed by its charter* gains no *right of way* thereby. See, also, D. & R. G. vs. Wilson, 28 Colo., 6.

11 *Sup. Ct.*, 393, *supra* (Field):

"When the *termini* of a railroad are mentioned for whose construction a grant is made * * * the road should be constructed upon the *most direct* and practical line. * * *

"The route via St. Cloud and covering to the intersection mentioned would be almost in a direct northerly line; a route via those places to Glyden would involve a westerly deviation of nearly 100 miles. Of course, such a detour from a direct line would be inadmissible."

See, also,

U. S. vs. N. P. R. R., 14 Sup. Ct., 598.
N. P. R. R. vs. DeLacey, 66 Fed., 450.
N. P. R. R. vs. DeLacey, 19 Sup. Ct., 792.

147 *U. S.*, 57, *supra:* "The grant does not attach to them (lands), if at the time they are pre-empted or otherwise segregated from the public lands. This principle is established by a large number of cases in this court."

156 *U. S.*, 537, *supra: First in time, first in right.* The rights of a pre-emptor sustained as against a patent to a railroad company.

139 *Fed.*, 614, *supra:* Lands that are covered at the time of a grant to a railroad by an "unlawful" pre-emption claim are *not public* lands and the railroad gains no interest therein, even though the pre-emption is subsequently canceled.

80 *Pac.*, 401, *supra:* Held *right of way* grant absolute, and *became fixed* in this case by the *construction* of the road.

81 *Pac.*, 1061, *supra:* (Syllabus): "A railroad acquires no title to a *right of way* appropriated by it as against an actual settler on *public* lands until it acquires such settler's right *by condemnation;* and a patent issued to him prior to the condemnation vests in him the full legal title free from any claim on the part of the railroad."

"The fact that an owner of land stands by and sees the survey and construction of a railroad on his lands, etc., *does not preclude him from maintaining a possessory action for the railroad's right of way.* When the execution on the judgment is *stayed in order that the railroad may condemn* and appropriate the right of way, so that the only effect of the judgment is to *compel the railroad to make compensation for the property taken by it.*"

For history of pre-emptions, see 28 Sup. Ct., 600.

101 *U. S.*, 276, *supra:* "We have had occasion to construe a very common clause of reservation in grants to other railroads * * * and in all of them we have done so in the light of a very general principle, that Congress in making these donations could not be supposed to exercise its *liberality at the expense of existing rights*, which, though imperfect, were still meritorious, and had just claims to legislative protection."

158 *U. S.*, 85-91, *supra:* (Brewer, J.) A review of all these cases, including Dunmeyer, to the effect that a grant to a railroad does not attach to land

covered by any kind of a prior claim whether it be legal or not. Such are not *public* lands.

89 *Fed.*, 659, *supra:* "In 91 U. S., 761, the Supreme Court defined *public* lands thus: 'The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under the general laws.'" * * *

"In 91 U. S., 330-337, the Supreme Court held that a patent related back to the date of settlement upon the lands patented *as disclosed in the declaratory statement, etc.*"

"The defendant's rights, therefore, relate back to a period prior to the fixing of the *definite route* of plaintiff's road."

43 *N. W.*, 967, *supra:* There must be an *express* grant of *right of way.* No such grant can be implied.

See, also, 43 N. W., 81.

The Supreme Court in the recent case (1903) of Nelson vs. N. P. R. R., 23 Sup. Ct., 302, gives full expression by majority and minority opinions (under either of which our title would be good), as to the date of the taking effect of railroad grants.

We have aimed to collect as far as possible cases relating to *right of way,* but we can see no difference that justifies a distinction under such acts as that of 1862 in favor of the Union Pacific and that of 1864 in favor of the Northern Pacific, as to when the land grants and the right of way grant took effect. The filing of a general map would, under both acts, cause the *withdrawal* of lands so far as the subsidy lands were concerned. They would stand in that position waiting the filing of map of definite location, and waiting the construction of the road. The requirements of the acts of filing of maps of definite location, and the yearly reports under oath as to lines surveyed and adopted, *cannot be ignored.* The grant of right of way was a floating grant, certainly of no higher class than military land warrants, until located. Neither took effect and both remained a float until

applied to distinct tracts of land as the act provides. *Nelson vs. Nor. Pac.*, 23 Sup. Ct., 302. As to right of way. *M. & St. Paul, Etc., R. R. vs. Doughty*, 28 Sup. Ct., 291 (1907).

All grants to the defendant to aid its construction of its line west from Kansas City come under and date from the act of 1869. Prior to that act it had no grants west of the 100 degree of longitude, and has never had any *right of way* grant west of that point.

U. S. vs. Nor. Pac. R. R., 152 U. S., 284; 14 Sup. Ct., 598.

The act of 1864 provided for the condemnation for a right of way 100 feet in width through private property. The defendant did not act under this; but it would seem that it never thought of claiming a right of way more than 100 feet wide until this case was brought. We have shown the dates of the patents of all land from our land to the center of the City of Denver. If our lands are to be taken, the decision will establish the title of the defendant to millions of dollars' worth of property that it has never thought any more of claiming than it has of claiming our land.

CONCLUSIONS.

A. The grant of a right of way is a separate and distinct grant. It must be specific and cannot be presumed. It takes effect (a) from the date of an act of Congress *specifically describing it* and giving its *termini;* or (b) when maps are required to define it, from the time of filing such maps, showing its location across the particular land; or (c) from date of *actual construction of the line.*

B. None of the acts of Congress gave the defendant any *right of way* west of the 100th meridian.

The defendant claims by the act of 1864. If the defendant was one of the roads referred to in said act, as entitled to build westwardly, (a) said act simply gave an *option,* to be exercised by filing a map. It never filed such map under the act of 1864, but, on the contrary, renewed its old filing under the act of 1862, and rejected the *option* tendered; (b) the act of 1864 did not grant to any of the branches the right to *build indefinitely westward;* but they are still compelled to join the main line at the 100th meridian, or as near that point as *convenient* and *practicable.*

C. The Kansas Pacific was not one of the roads referred to or described in the act of 1864 as being entitled to build westwardly. That act by specific declaration confined such right to the new Sioux City Company and the Burlington and Missouri River Railroad.

D. There is no plea of laches or of the statute of limitations offered by the defendant, and the decree of the state District Court and the opinion of the state Supreme Court shows that neither could obtain against the plaintiffs' title; while, on the contrary, their title is made perfect by the payment of taxes for a much longer period than is required by law. Even had defendant acquired the right of way by the act of 1862, and as of that date, and had filed all maps required of it, still it took its title subject to the police powers of the state of Colorado as to the collection of its revenue. It cannot deny the right of the state to make the payment of taxes for five years, under color of title (patent), conclusive evidence of ownership of lands within its borders. Therefore the plaintiffs have, by the payment of

taxes on these lands, many times extinguished all rights that the defendant might have gained by such a grant.

From 1866 to the present (nearly 45 years), the grantors of the plaintiffs and the plaintiffs (finally), have paid all the taxes on this land, which at this writing will not be less than $60 per acre. The defendant has never paid one cent of tax on the land and well knew, as the public records informed it, that plaintiffs were making such payments under the claim of being the absolute owners by patent from the United States. The defendant has never denied or questioned plaintiff's title, and when approached upon the subject admitted it had no title and was ready to negotiate for and pay for its right of way as soon as the Iliff litigation was ended. It admitted itself as being nothing more than an innocent trespasser, that was ready to come to honorable terms with the owner by acquiring an easement of right of way therein. The evidence of actual possession or pedis possessio of these lands by the plaintiffs and their grantors is much more than is usual as to wild and uncultivated land. The plaintiffs and their grantors have ever been in the continual open, notorious, adverse possession as against the world of all these lands. The occupation and possession descended regularly from Eastman to Iliff for the use of Adams without a break or question, and all of these years no one has been, or could be, misled as to who was the owner of and in possession of the land. Emphasizing these facts and making this case different from all others, is the feature that the real owner from the year 1867 up to the bringing of his suit against the Iliff heirs on Dec. 15th, 1890, was insane. This insanity was not found or adjudged in an exparte proceeding in the county court as is the usual way; but after a most earnest contest it was so found by the District Court and then readjudged by the highest judicial tribunal of the state. FURTHER. IT WAS FOUND AND ADJUDGED

IN DIRECT REFERENCE TO THESE LANDS. These judgments and decrees are a part of the muniments of the plaintiff's title herein, and binding upon the defendant and the world. Wells' Res Adjudicata, **sections 174 and 354.**

From the opinion of the Supreme Court, at the very time that the defendant entered upon the lands of Adams (1870), he was most sorely afflicted in the City of Washington. From that time on the world was a blank to him. For 18 or 20 years he was being carried about like a child from one part of the United States to another, wholly helpless so far as considering or looking after any property rights were concerned, and not having a thought in reference to such matters. As soon as he was able to assert himself, and even before he could legally assert any rights in a court against the defendant, he calls upon it in reference to this right of way. His title and rights are recognized without question and he is assured that as soon as he can quiet his title against the Iliff heirs the company stands ready to settle with him. We wish to do Mr. Orahood the justice of saying, that if Adams had lived and Mr. Orahood had continued as the defendant's attorney and business manager in Colorado, in our belief, it would not have been necessary to bring this action. No one at present seems to be responsible for the morals of this defense.

F. That portion of the defense that rested upon the claim that action to quiet title would not lie, and that the allegations of the complaint were not sufficient for a bill in equity, are settled and eliminated from further consideration by the finding and judgment of the Court of Appeals in our favor.

THE PRINCIPAL ISSUES.

1st. The position of petitioners:

(a) That the first part of section 9 of the act of 1864 refers to the branches that were made such by the act of 1862 and provided for their "convenient" connection with the Union Pacific at the 100 meridian (or substantially the 100 meridian) by the construction of ferries and bridges over navigable streams. That the K. P. R. R. is one of these branches under the act of 1862.

(b) That the proviso "that any company authorized by *this act* to construct its road and telegraph line from the Missouri river to the initial point * * * may construct * * * so as to connect with the Union Pacific at any point *westerly* of such initial point," clearly and distinctly grants that privilege to those roads only that were made feeders by the act of 1864, namely, the B. & M. R. R. and the new Sioux City Company, and also *clearly excluded* the K. P. R. R. from such privilege.

(c) That, regardless of *what branches* were included in the last provision of section 9, it did not authorize such branches to build *indefinitely to the westward,* but, at farthest, only to a "convenient and practicable" connection with the U. P. R. R. at or near the 100 meridian.

(d) That no grant of the *right of way was ever given to any of said branches, by any act of Congress,* west of the 100 meridian. That such a grant cannot be implied, but must actually exist in express words; and especially such a grant could not be implied from the use of the word "benefits," when there are many other benefits in the same act to which that

word more aptly applies. Further, it is shown by the act that it never was intended to apply to a right of way.

(e) That the act of 1864, being simply an *option* offered to certain roads to build westwardly, etc., it must be shown that they accepted of said *option* by filing maps thereunder, changing the old route and designating the new one.

(f) Section 12 of the act of 1864 shows that it was not the intention of Congress to allow the K. P. R. R. to build west of the 100th meridian except upon the forfeited right of way of the Union Pacific from that point west.

(g) The act of 1866, interpreting the act of 1864, is conclusive upon the point that it was the defendant's duty at the date of said act to unite with the U. P. R. R. at the 100th meridian, and has the same effect as a special enactment of that date to that effect.

(h) That the grant of a right of way is necessarily in the nature of a float, although a grant *in praesenti*, like a military land warrant. It becomes fixed only by filing map of definite location or by actual construction.

2. *The position of the respondent.*

(a) That all branch roads named in both acts (1862 and 1864—six in number), as being required to meet and connect with the Union Pacific at the 100th meridian, were released from such obligation by section 9 of the act of 1864, and could build "westwardly" as far as they pleased, so that they united with the Union Pacific at any point east of its junction with the *Central Pacific* at the eastern line of California.

(b) That the word "benefits," as used in the Act of 1864, means *right of way*, and that it also includes the immense land grant for each of said roads, as the K. P. R. R. says it also became entitled to its lands by the Act of 1864.

(c) That where the act of 1864 says THIS ACT, it means also the act of 1862.

(d) Respondent concedes that the act of 1864 was, at most, only an option that was given to said branches to change their route by filing a map showing such change of route, and it concedes that no such map was ever filed by it under the act of 1864, but on the contrary it filed its map adhering to the line it had chosen under the act of 1862.

(e) That it is sufficient to tie a right of way at one end only (the Missouri river), and then build trunk lines, each from 1,000 to 1,200 miles in length, and that all lands lying "westwardly" of the initial point are covered by a right of way given to each of said branches.

(f) That the words "convenient," "more practicable" and "more desirable" in relation to the point of union have really no meaning by way of limitation.

(g) That section 12 of the act of 1864 does not indicate that Congress still intended that the K. P. R. R. should build to the 100th meridian and then unite with the Union Pacific, as it had agreed to do.

(h) That the act of 1866 was not a congressional construction of its prior act of 1864, and that, when it declared that on the 2d day of July, 1866, the K. P. R. R. was then "required by law" to build to a union with the U. P. R. R. at the 100th meridian, that it did not appreciate its prior enactments in reference thereto.

THE OPINION OF THE COURT OF APPEALS.

Is it probable, as is held by the lower court, that Congress, after having made such sacrifices of lands and national bonds as it did by the act of 1862, in order to build the Union Pacific road, with its many branches feeding it at the 100th meridian, would, in two years thereafter, give to each and every branch the right to build from the Missouri river to the east line of California, six trunk lines competing with the Union Pacific? Still, the lower court tells us that it did this by the latter portion of section 9 of the act of 1864. At that time much had been done by all these branches toward carrying out their obligations under the act of 1862. The defendant, in particular, had built to a point west of Fort Riley. Millions had been expended by the Union Pacific and its branches, and by the government in its donations of lands and bonds, upon faith in the express condition that all of these branches were to unite with the Union Pacific at the 100th meridian.

The Court of Appeals expressly admits that the *right of way* west of the 100th meridian cannot be claimed by the defendant under the act of 1862, because such right of way was expressly limited to the uniting point at the 100th meridian. It also expressly admits that such a right cannot be claimed as against us under the act of 1866, because the lands in question had ceased to be *public land* at the time of the passage of the act of 1866. But it is said that defendant was granted a right of way by the word "benefits," used in section 9 of the act of 1864. Two cases are cited, 97 U. S., 491, and 99 U. S., 455, which it is said adopt this view and "seem to be decisive of the question"

(we will examine these cases later). But the court adds: "Were the question an open one we should resolve it in the same way, because of the very plain language of section 9." Therefore the construction that the court places on section 9 may be said to be the basis of its opinion. The language of this section is spoken of by it as "very plain;" again, as being "plain and direct;" again, as "clear and specific," and, still later, as "clear and explicit."

The fact that whatever was granted by section 9, and to *whatsoever roads or branches* it was granted, was simply an *"option,"* as stated and insisted upon by the Court of Appeals, and by all the quotations made by it, is entirely lost sight of by it in reaching its conclusion. It does not claim that section 9 of the act of 1864, in and of itself, changed the line or western terminus of any of the branches; but it is simply claimed that it gave the branches the *option*, each for itself, to change and build indefinitely *westwardly*. Should we, for argument's sake, concede the correctness of the interpretation thus made of this act, before the defendant could claim anything therefrom it must *affirmatively* show that it *changed* its line and western terminus by the filing of a map *under the act of 1864*.

It is admitted it did not file any such map; on the contrary, it directly rejected such *option*. This is plainly and distinctly shown by the principal case relied upon by the Court of Appeals, to wit, *Mo., etc., Ry. Co. vs. K. P. Ry. Co.*, 97 U. S., 491. It is there said:

"Under this act (1862) the plaintiff on the 17th day of July, 1862, filed a map showing the general route of its said road; and lands within 15 miles on each side of it were accordingly *withdrawn* from sale. *This route extended along the Kansas river from its*

mouth to the Republican river, and thence along the left bank of the latter to the 100 meridian."

Here we have the contract and compact entered into by the K. P. R. R., not only with the United States, but with all other railroads mentioned in the act of 1862. The opinion proceeds:

"On July —, 1864, Congress passed an amendatory act enlarging its grant of land to the U. P. R. R. and the companies authorized to connect with its road * * * and extending for one year (July, 1865) the time of designating the general routes of their respective roads and providing for the issue of patents, etc. Under this amendatory act *the plaintiff filed a map* designating the general route of its road *west of Fort Riley, up the Republican river,* but this route was never approved by the president, as required by the original act of 1862, and no withdrawal of lands along this proposed route was made *other than that of July, 1862,* and, of the land *then withdrawn* west of Fort Riley, only such are claimed by the plaintiff *and were included in the subsequent withdrawal* under the act of 1866."

If we apply this language to the *right of way,* it would read that the plaintiff claimed no right of way except such as was *granted by the act of 1862 and the act of 1866.*

It will be noticed that the map filed under the act of 1864 made no change whatever in the route, or the *western terminal* of the K. P. road, from the map filed under the act of 1862. Though it be said that this map was not approved by the president, that can make no difference whatever in the matter we are here considering. The map filed showed an election by the defendant *to adhere to its original route and terminal,* as designated by the act of 1862, and *not to accept of any option* that may have been given it

by the act of 1864, *to change its route or change its western terminal* from a connection with the U. P. R. R. at the 100th meridian. No other map was ever filed by the defendant under the act of 1864. The Republican river route departs from the state of Kansas into the state of Nebraska, about midway of the *north line* of Kansas, and quite near the 100th meridian. The Smoky Hill river route, which was finally selected by the defendant under the act of 1866, departs from the state of Kansas into the state of Colorado about midway of the *western line* of Kansas.

At the time that Eastman entered the land here in dispute, the K. P. R. R. had not only failed to file any map under the act of 1864 (or any other act) that could by any possibility have ever touched the Eastman tract, but its time for filing such a map, under the act of 1864, had lapsed about eleven months. On the contrary the K. P. had rejected the *option* given it by the act of 1864, by filing a map adhering to its original route.

The case proceeds:

"On the 3d day of July, 1866, Congress passed a special act authorizing plaintiff to designate the general route of its road and file a map thereof at any time before the 1st day of December, 1866, and providing that *after* the filing of this map, the lands along the entire line so far as was designated should be reserved from sale by the secretary of the interior. It also declared that the company should connect its line of road with the U. P. at a point not more than 50 miles westwardly of the *meridian* of Denver, Colorado.

Under this act the plaintiff, on the 11th day of July, 1866, filed a map in the department of the interior designating as the general route of its road *a line from Fort Riley to the western line of the state,*

by way of the *Smoky Hill river*, instead of the *Republican river*, and on the 26th of the same month *the lands* upon *this route* were withdrawn from sale by order of the secretary of the interior. The lands thus withdrawn embrace those in *controversy* in this case."

The case includes only lands that were granted by the act of 1862 and 1866. It is not claimed, even by the company, that it gained any title under the act of 1864 to these lands; then why should it be cited to show that it gained any *right of way* under the act of 1864?

It will also be noticed that the act of 1866 did not require the *K. P. R. R. to build to or by way of Denver*. It was simply required to unite with the U. P. at a point not more than 50 miles west of the *meridian* of Denver. Had it built upon such a line from Fort Riley west by the most direct and practicable route, which the law required it to do (Harris case and other cases), it must have missed Denver from 75 to 100 miles.

It was only by the act of 1869 that it can possibly claim authority to build to Denver, and this was about three years after the land had been entered by Eastman.

We claim to have shown that there is no reasonable ground for the *"option"* theory of the lower court in reference to the act of 1864.

1st. There was no *option* given by the act of 1864 to the K. P. to build to Denver.

2nd. There is no showing of the K. P. having filed a map accepting any such *option*.

3rd. Denver was not a point on, or that could properly have been embraced in, the route under the

act of 1866. And never, until the act of 1869, could the K. P. have properly built to Denver. No act of Congress embraces any grant of right of way to defendant farther west than the 100th meridian.

The court says that, while section 12 of the act of 1864, if taken alone, implies that the western terminal of the K. P. R. R. was to be at the point of its connection with the U. P. at the 100th meridian, and from that point west it could only build on the forfeited rights of the U. P., it declares that such implication is more than overcome by the "clear and specific language" of section 9. The court then uses this language:

"And particularly when due regard is had for the fact that the former (section 9) does not lay any *duty* upon the company in respect of the western *terminus or otherwise,* but only gives it, in a stated contingency, an *option* to proceed to a connection with the *Central* Pacific instead of connecting with the Union Pacific. This *option* in no wise militated against the existence or exercise of the *other option* given in section 9. So understood, as we think they must be, neither of the provisions of section 12 is in conflict with or operates to restrain the one in section 9."

According to the lower court, this peculiar section 9 gave the K. P. R. R. *three options:* (a) It could build to the point of connection at the 100th meridian and stop there, whether the Union Pacific was there or not; (b) If it saw proper to do so it could take possession of the forfeited rights of the Union Pacific and build to a connection with the *Central Pacific;* or (c) It could cut loose from the point of junction altogether and build an independent line clear through to the state of California, so that it united with the Union Pacific, say, one-fourth of a mile east of the

California line. The court says that section 9 does not "lay any duty" upon the company in respect to the western terminus, or otherwise; but that it, in a stated contingency, gives it an option to connect with the Central Pacific instead of the Union Pacific. "This option in *no wise militated against* the existence or exercise of the other option given in section 9."

If this be true, then there could be no objection to the K. P. accepting of both and building two lines through to California, with all their attendant gifts of bonds and lands. It must require a long, continued and laborious effort to believe such a proposition. Again, in reference to section 12, it is said:

"Whilst it is said in section 12, 'and the said railroad from the mouth of the Kansas to the 100th meridian of longitude shall be built by way of Lawrence and Topeka, or on the bank of the Kansas river opposite said points,' *if taken alone gives rise to an* implication that the WESTERN TERMINUS WAS TO BE ON THE 100TH MERIDIAN, it is too slight to restrain or overcome the plain and direct language of section 9. * * * Both contemplate a connection with the main line as far west as the 100th meridian; one expressly provides that this connection may be made farther westward," etc.

According to the opinion of the lower court here are additional options. The court apparently loses sight of the controlling fact that, under section 12, if the K. P. builds the Union Pacific west it must take possession of it *and* BUILD IT *from the 100th meridian.* It can not go a few miles west of that and leave a gap between all the eastern branches and the main trunk west. This, surely, is quite clear. So that when the court says that each of these options (as it construes section 9) can be given "full effect without infringing on the other"—that, by section 9, the connecting point

may be near the California line, while, by section 12, it must be at the 100th meridian—there is an evident mistake in the conclusion of the learned court.

Does not this unnecessary mixing and confusing of matters all grow out of the attempt to draw from section 9 the right for each and all of these branches to ignore all union with the U. P. R. R. at the 100th meridian and to build independent trunk lines to the west? If one of them has such a right, they all have it. We claim that no such conclusion can be rightfully drawn from that section. It means nothing more than that the point of connection must be at the 100th meridian, *or substantially there.* It might be slightly varied to the west on account of natural obstructions and in furtherance of "convenience" and *"practicability."*

It seems to us that Senator Kirkwood correctly expressed the meaning of this section (Congressional Globe, page 3264, June 19, 1866):

Mr. Kirkwood: It seems to me we are acting somewhat blindly in this matter and undoing what has been carefully done heretofore. The idea of the Pacific Railroad, as I understand it, was to make one trunk line from the 100th meridian west and three branches uniting at *or about* that point with the main trunk. * * *

Mr. Hendricks: Yes, sir. Now, the act of 1864 allows the junction at a point west of the 100th meridian, but it does not repeal that portion of the law of 1862, as I understand, which requires the junction to be made between *those two rivers.* So I am not sure that the senator is exact in his construction of the legislation up to this time.

Mr. Howard: That is necessarily repealed.

Mr. Henderson: It must be so, because this whole legislation is in perfect conflict with that act. It permits them to unite with the U. P. R. R. at any point west.

Mr. Hendricks: That is so, but the legislation of 1862 required a junction at the 100th meridian *between these two rivers.* The legislation of 1864 simply allowed the junction west of the 100th meridian, *but does not cease to require the junction between the two rivers.* * * *

Mr. Kirkwood: * * * But the senator from Kansas differs from these gentlemen in the matter of fact. He says that, under the legislation of 1864, if I understand him, the company *is still compelled to follow the route up the Republican river, and that the only effect of the legislation of 1864 is to relieve them from joining the main stem at the precise point of the 100th meridian and allow them to join that main stem as near to that as may be convenient.*

Mr. Pomeroy: I said precisely what the secretary of the interior said in regard to the matter, in his report before the committee, that under the legislation of 1864 it was agreed that the law provided that the gateway as it were to the mountains should be between the valley of the Platte on the north and of the Republican on the south, but if they desired to extend the initial point beyond the 100th meridian, *keeping between these rivers all the time,* they might go, and should not have any more bonds or land than if they had connected at that point. This is the way that the secretary of the interior, sustained by the decision of the attorney general, claims *that the law now is.*

Mr. Kirkwood: It seems that the secretary of the interior held that, under the law of 1864, the right of going up the Smoky Hill route is not accorded to them, and they yet must go up the Republican River route; that the only benefit derived by them from the legislation of 1864 is that they are not compelled to unite with the main stem *precisely* at the 100th meridian, but *near to it, and still between the valley of the Platte and valley of the Republican.*

Mr. Pomeroy: In regard to the fact that the plat, in the first place, had been filed (under act 1864), and, secondly, that *it could not be removed except by act of Congress* * * * they have filed a plat, and this legislation is designed to *enable them to file one on another route.* The attorney general, in his opinion, did not say whether the law changed the initial point or not. * * *

The Department of the Interior holds to-day that the legislation of 1864 confines these routes between *the valley of the Republican and the valley of the Platte*

Mr. Kirkwood: So I understand there is a very material difference in point of fact.

Mr. Pomeroy: I hope the senator will indulge me for a moment in saying that I do not mean that I am not, or that the people of my state *are not glad to have the route changed.* * * * I am for all the roads I can get through the state; I am not making opposition, I am only stating the fact, that it is *so held in the Department, and I believe that to be the law, but if we can change it* that is another thing.

Mr. Kirkwood: It appears, then, that there is really a difference. The senator from Missouri claims that, under the legislation of 1864, the eastern division

of the road has the right to go up the *Smoky Hill route now.*

Mr. Henderson: I do.

Mr. Kirkwood: The senator from Kansas tells us that the Interior Department and the attorney general *hold otherwise.*

Mr. Pomeroy: I will ask the senator (Henderson), Does not the secretary of the interior hold that to be true?

Mr. Henderson: I do not know. * * * The senator is correct that the attorney general said that, although we had up to the 1st of July of this year to file a plat; *having filed one plat, we could not withdraw that and file another; we were concluded by having filed one and could not change the route as indicated by that plat.*

From the foregoing it seems clear that, in 1866, the senate was agreed upon the proposition that the act of 1864 did not allow any of these branches to go farther west than they could go by following a line between the Platte and Republican rivers. This would have forced them to join the Union Pacific Railroad at a point from 150 to 200 miles northeast of Denver. It seemed to be further conceded by all that, as the K. P. Railroad had filed one plat under the act of 1864, following up the Republican river to the 100th meridian, that it had irrevocably made a choice of that route and could not change therefrom without being enabled to do so by Congress. We believe that the position taken by Senator Kirkwood, that the act of 1864 compelled the railroads that were allowed to build westwardly to join the Union Pacific at the 100th meridian, or in the vicinity thereof, is the only tenable ground that can

be taken. We may not have read all that was said on this subject, but we have failed to find where any one was courageous enough to claim that these branches might build westwardly to the west Nevada line.

All bonds and subsidy lands were withdrawn by the act of 1864 (section 9) for such portion of the lines of said branches as might be beyond the 100th meridian, *and no grant was made of any right of way.* If it took an express and separate grant of a right of way up to the 100th meridian, it would require the same kind of grant west of that. The whole act shows that Congress expected a connection substantially at the 100th meridian.

The court says: "The other branch of the contention has reference to the provision in the first section of the act of 1866:

"'Provided, that said company shall be entitled to only the same amount of bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the 100th degree of longitude, as *now required by law.*'"

The lower court, in order to hold that Congress meant something else than its plain language indicates, transfers the phrase, "as now required by law," from the end of the quotation to the beginning of it, and intimates that Congress would have had "a more correct appreciation of prior legislation" if it had so written it. It is not a rash presumption to suppose that Congress has such a knowledge of the English language as enables it to express distinctly its ideas. If its language is not insurmountably ambiguous, no court has the right to rearrange it, so as to extract

therefrom a meaning not intended by Congress. It has the right to make such laws as meets with the approval of its best judgment. We shall presently see that, by the decisions of this court, the provision above copied is absolutely conclusive, as against the findings of the lower court. But we shall first attempt to show the error in the reasoning of the court.

The court maintains that the proper subject of the verbal phrase "as now dequired by law" is *bonds*, instead of the *100th meridian*.

It says "if they apply to only what follows the subjunctive 'if,' as is asserted by appellants, they indicate that Congress regarded the clear and explicit language of section 9 of the act of 1864 as meaningless."

Note: The court seems to be bewildered over what it elsewhere terms the clear and explicit language of section 9. We shall presently show the extent of this mental confusion.

Note: We pause here to suggest that if they extend to the entire provision, that is, if the words, "as now required by law," apply to the bonds as well as the 100th meridian, nothing has been gained in favor of the court's argument. If the words, "as now required by law," should be applied to the whole sentence, i. e., to the bonds and the 100th meridian, nothing has been gained by shifting its connection from that in which Congress placed it. But it will be noticed that all that is said thereafter by the court treats these words as referring *exclusively* to bonds, and virtually eliminating the 100th meridian from any consideration or notice.

In using the language it did, Congress had reference to something that was at that time (July 3, 1866)

required by law. This something was in reference to this particular railroad.

We cannot think of anything that was "required" by law in reference to its bonds. No one claims that any of the branches building west of the 100th meridian were entitled to any bonds. The plain language of all the acts shows they were not. How, then, can the word "required" properly be made use of in reference to bonds?

As regards the western terminus, the defendant surely had been "required" by law by both the acts of 1862 and 1864 to make connection at the 100th meridian. Defendant says that the act of 1864 gave it the *option* to change this point of junction, but it does not claim that it ever accepted of such option by making any change.

For Congress to say that these branch roads should not have bonds for building westwardly, as now required by law, would be a strained and untruthful statement, because there was no such provision of the law. To say that the lines should unite at the 100th meridian, *as now required by law,* is an appropriate, natural and truthful statement, for the law at that time did require them to connect at the 100th meridian.

We submit also that the grammatical construction of the paragraph contended for by the court is wholly untenable. Here are different clauses in this sentence and one or more of them is referred to in words, as now required by law. To which do they naturally refer?

If they referred to one as used by Congress, and to another as used by the court after it had changed

the arrangement of the language of the Congress, which one should be adopted?

Parsons vs. Circuit Judge, 37 Mich., 289.
Central Pacific R. R. Co. vs. Shackleford, 63 Cal., 265.

As to the effect of this declaration of Congress in 1866, that this defendant was at that time required by law to unite with the U. P. at the 100th meridian, we will confine ourselves to quotations from decisions of this court.

In Stockdale vs. Insurance Co., 20 Wallace, 323-331, this court said:

"Both in principle and authority it may be taken to be established that a legislative body may by statute declare the construction of previous statutes so as to *bind the courts* in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.

See, also,

Stebbins vs. Com. of Pueblo County, 4 Fed., 282.
Singer Manufacturing Co. vs. McCollock, 24 Fed., 667.

We now notice the last point in the opinion of the Court of Appeals. It says:

"Finally, appellants rely upon the recent decision in Union Pacific Railroad vs. Harris, 215 U. S., 386; 30 Sup. Ct. Rep., 138, as definitely holding that the authority of the company to extend its road west of the 100th meridian was derived from the act of 1866 and not from the act of 1864. Of course, if that decision be as stated, it must be followed in this case."

The court does not deny that the opinion is *as stated;* but it attempts to show (a) that the case might have been determined upon another point, and, (b) *that the Supreme Court was in error in holding as it did upon the point stated.*

A court has the right to give as many conclusive reasons as may exist for the position it takes. At this time we are only interested in combatting the opinion of the Court of Appeals in holding that the Supreme Court was in error in regard to the act of 1864.

The Court of Appeals commences its assault upon the Harris opinion as follows:

"And yet the opinion does not mention the provisions in section 9 of the act of 1864."

Here we are again faced by this wonderful section 9, that the court conceives is so "plain and direct," so "clear and specific," so "clear and explicit," etc., etc. Still, if we are correct in the next point we shall make, the opinion of the Court of Appeals will show that *it did not understand it at all.* But to continue in reference to the point now under consideration. The court concedes, first, that this section did nothing more than to grant defendant an *option,* and that such *option* was never accepted or acted on, *but was absolutely rejected* by filing a map adopting the old line of 1862. Still the Court of Appeals insists upon treating it as having been accepted and acted on, and the K. P. R. R. route as having been *changed thereby clear through to the city of Denver, and thence north to a connection with the U. P. R. R. at Cheyenne.*

2nd. The court conceives that a right was granted to these branches to build about 8,000 miles

of road at the government expense, when the broadest construction allowable is, that they could only build westward to the extent of making their connection with the Union Pacific more *convenient and practicable*—that such connection must be substantially at the 100th meridian.

3rd. The court conceives that the word *benefits* is sufficient to grant a right of way that has *no western terminus*. The route of these five or six branches might swing hundreds of miles to the north or south of the U. P. R. R. So long as they built "westwardly" they were within the language of the so-called grant. The whole West for hundreds of miles in width was thus made subject to the right of way for these several branches. The government was handicapped in disposing of its lands to the extent that it could not make a good title to any 40 acres in this whole scope of country. The case at bar is an instance wherein we are told the government patent fails to convey the land it purports to convey on account of this novel right of way. Homesteads, cities and towns are liable to be taken away indefinitely in the future. This riotous right of way, as uncertain in its path as the tail of a comet, commenced at the Missouri river and extended westward to the California line, at the whim of each and all of these branch roads.

4th. The court conceives that when Congress declared, in 1864, the "benefits" of *"this act"* it meant thereby to say that the companies might also have all the benefits of the act of 1862, including a separate and distinct grant of a *right of way*, given solely by the act of 1862. Is not such a construction wholly unreasonable?

5th. The court conceives that Congress would have the right to release all of these branches from connecting with the U. P. R. R. at the 100th meridian, although the act of 1862, section 17, expressly says: "Congress may at any time, *having due regard* to the rights of said companies *named herein*, add to, alter, amend and repeal this act." Such would be the common law and the constitutional right of each of the companies independent of this clause. Millions of dollars had been advanced by the government and these companies upon the faith of the compact. And although the K. P. R. R. had, from the beginning, sought to be relieved from the compact, it was not until 1866 that the U. P. R. R. and the others interested allowed it to go its way without objection. The true meaning of this being that the U. P. was at that date its virtual owner.

6th. The court conceives that *this court* has determined, by language used in cases that did not remotely involve the question of *a right of way*, under any act, that the defendant obtained such a right of way grant by the act of 1864 for its whole line west of the 100th meridian, wherever it might determine to build.

7th. The court conceives that these very "clear and explicit" provisions of section 9 are in an obscure place, and that this court overlooked them—that the decisions made by you thirty years ago were forgotten by you. It further finds fault with the manner in which the railroad company presented the Harris case to you. It further says that it has examined a copy of the brief in that case. We never heard of this brief before, and we supposed that we were advised of all filings and authorities cited in the case.

The case made out by the writer of the opinion against this court is a very strong one of (excusable) neglect. Since the Circuit Court of Appeals could give no better excuse for the supposed error of this court, it would have been better if it had not offered any. All of this, however, it attributable to this wonderful section 9.

However, that this court *did not overlook section 9 or its former decisions* is made quite plain by the latter part of the opinion in the Harris case, where the writer states that an opinion delivered by himself must be considered as overruled, and then proceeds:

"We do not think that it would be profitable to cite the *many other* cases which touch the question before us more or less closely, or to seek to *point out the differences* between them and this, or to notice all the *general expressions* which are to be found in them."

No one questions the correctness of the conclusions reached in 77th and 79th United States, and the Harris case is as free from interfering with them as they are from interfering with the Harris case. It would be a singular doctrine to hold that a court is estopped by general expressions incidentally used in another case, when no such question was involved. Cohens vs. Virginia (6 Wheat., 264-399), cited by respondent on page 15 of its brief.

8th. The Harris case holds that there must be a terminal point as well as a starting point prescribed in the act that grants the right of way, and that a right of way commences only from the date of an act granting it. In that case, the lands in question were 45 miles west of any right of way that the K.

P. R. R. could have had by the act of 1862, as amended by the act of 1864, and were held not to be covered by either. What, then, is to be said of lands that were many hundred miles still farther west? The opinion of this court in the Harris case, and that of the Court of Appeals in this case, cannot both stand, and this is conceded by the Court of Appeals, for they argue that the Harris opinion should be overruled on account of the error they claim to have pointed out therein.

THE KANSAS PACIFIC RAILROAD IS NOT EMBRACED IN THOSE ROADS THAT WERE ALLOWED BY THE ACT OF 1864 TO BUILD WESTWARDLY; THAT PERMISSION APPLIES, SOLELY, TO THE NEW SIOUX CITY ROAD, AND THE BURLINGTON AND MISSOURI RIVER RAILROAD.

By the act of 1862 there was a main line (the U. P.) from the 100th meridian to the west line of Nevada that was given a right of way and certain subsidies in lands and government bonds. The principal branch was the Leavenworth, Pawnee and Western Railroad. It was required to unite with the Union Pacific at the 100th meridian, and was given right of way and subsidies to that point. Other roads required to connect with the Union Pacific at the 100th meridian by said act were the Hannibal and St. Joseph Railroad (or the Pacific Railroad of Missouri), but it got aid for the first 100 miles only.

The U. P. (or Pacific) Railroad was required to build a branch from Sioux City, Iowa, and join its

main line at the 100th meridian. It was to have a right of way and the same subsidies per mile as were granted to the main line. The Union Pacific was also required to build a branch from Omaha to a junction with the Union Pacific at the 100th meridian, on the same terms and conditions per mile as was given it as to the main line. This made four branches—one from Kansas City, one from St. Joseph, one from Omaha and one from Sioux City. These are *all* the roads that were spoken of in the act of 1862 as eastern branches of the main line of the Union Pacific.

In 1864 they had all accepted of the act of 1862, and more or less construction and expenditure of money had been made by each of them, and by the government in reference to the lines chosen by them.

By the act of 1864 two new companies—the new Sioux City Company and the B. & M. R. R. Co.—were brought in as feeders of the Union Pacific, and required to join the main line at the 100th meridian (except as they may have been relieved as to the exact point of union by section 9 of that act). These two roads were not bound by the act of 1862, and were in no way parties to that compact.

Let us now apply section 9. The whole section is independent legislation. It does not purport to amend by striking out any part of the act of 1862 and inserting anything in lieu thereof. The first part of the section reads:

"And be it further enacted, That to enable any one of *said corporations* to make *convenient* and *necessary* connections with other roads, it is hereby authorized to establish all necessary ferries," etc.

And it further provides, at length, for the construction of bridges across navigable rivers. What is meant by *said corporations?* Unquestionably this

refers to those feeders that were made such by the act of 1862, including the K. P. R. R. This is made doubly certain by section 5 of the act, where these particular corporations are referred to. Besides, the B. & M. R. R. and the New Sioux City Company had not yet been brought in, and could not properly be referred to as *said* corporations. It also refers to corporations that were required at that time to make *necessary* connections with other roads, and make them conveniently. It did not purport to change the route or terminal of *said* corporations, or any of them. Neither could it lawfully do so. This part of the section is very full and specific as regards the additional privileges that are conferred on *said* corporations.

The next part of the section is notably different in every respect. It says:

"*And, provided further,* That any company authorized by THIS ACT to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph so as to *connect* with the Union Pacific at any point westwardly of such initial point, in case such company deems such westward connection more practicable and desirable."

Were the K. P. R. R. or any of its predecessors thus authorized by "*this act,*" or the act of 1864? Certainly not. Then the K. P. R. R. is not included in the right to build westwardly. What companies were authorized by *this act?* It is equally clear that the new Sioux City Company and the B. & M. R. R. Company were the only companies authorized by the act of 1864. They had no authority to build under the act of 1862, and their only authority is derived from the act of 1864. They come fully within the descrip-

tion as given by the act of Congress. Both of them are to build from the Missouri river to the initial point at the 100th meridian, and their authority is derived solely from the act of 1864. Again, these companies could rightfully be authorized by Congress to build west of the 100th meridian, as they were in no manner bound by the act of 1862. They had never accepted of it or agreed to it. They were newcomers, and were dealt with as such.

We are far from admitting, or intimating, that either of these companies had the right to construct independent competing TRUNK LINES *by the authority thus given.* Already as many branches were required to unite at the 100th meridian as probably could conveniently do so, and if these two companies should, under the circumstances, find it more practicable or desirable to unite with the Union Pacific a short distance west of that point, what objection could be made thereto?

Such a construction allows of a sensible interpretation of section 12 of the act of 1864, and also of the act of 1866, while that contended for by the defendant herein nullifies both.

Again, it is further provided by said section 9:

"and to aid in the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the 'benefits' and subject to all the conditions and restrictions of THIS ACT."

The benefits that were to be derived by the new Sioux City Company, and the B. & M. R. R. Company, under the act of 1864 were different. The new Sioux City Company was to receive bonds up to the 100th meridian, and thus far it stood on the same

basis as all the other branches, including the defendant. But the Burlington road was not to receive any bonds at all, and in this it differed from all the rest. The new Sioux City Company, in case it failed to complete its road in 10 years from the date of the act of 1864, was to absolutely forfeit all the road it had built to the United States—a condition that is not attached to the grant to any other branch. Therefore, the act treats of each company singly. Other distinctions might be pointed out, but it is unnecessary, for the defendant admits that if our interpretation of the language of section 9 is the correct one, and if it is to be applied as it is written, then that is the end of their contention. But they say (and so plead) that in both instances where Congress used the language *"this act"* it meant to say: *"this act and the act amended thereby."*

The Court of Appeals, without being able to express itself on this most important matter of contention, passes over it, as if it was not in the case, and quietly adopts the defendant's claim as stated.

We have heretofore shown (page —— hereof) that reference is made to acts of Congress 43 times in the act of 1864; and if Congress failed in the instance cited by defendant to express its true intent, it is the only mistake it made. When we study the act of 1864 and take it as Congress has written it, it is remarkably clear, distinct and consistent. When we attempt to engraft other conditions, or add other language to that used by Congress, we are involved in endless confusion, and there is no authority in law for so treating an act of Congress. We have the same right to change any and all of the 43 references

to acts of Congress that we have to change this one. The B. & M. R. R. never claimed any right of way west of the 100th meridian by virtue of this act. All of its right of way was taken under the act of 1875. The defendant, for nearly 40 years, never claimed any such thing. It was only when the road passed into the hands of the thrifty Harriman, and millions of dollars were to be made thereby, that the present claim was made. The grant of a right of way has always been construed to be an independent grant, that must be expressly made by language, independent of other grants, and not doubtful in its nature. Now we are told that it may be implied, and implied from the use of the single word, "benefits," when the word as used surely has no relation to a right of way, and was never so intended.

The defendant will doubtless rely solely upon words chosen here and there from decisions of this court, in reference to other matters and upon other issues, and contend therefrom that our construction above contended for is wrong. Take, for instance, the citation in 99 U. S., 455, quoted by the Court of Appeals. This language is the strongest against us of any that can be cited, and it will be noticed that it consists chiefly in reciting the act. It is used in reference to other matters. There seems to have been no issue or question existing between counsel in this respect. We are far from admitting that language so used closes a question not before the court, and gives to this railroad company millions of dollars that it is in no sense entitled to.

We have been met at every point in this case with selected excerpts from U. S. vs. U. P. R. R., 91

U. S., 12. If the language quoted was applicable and proper in that case, it surely has no application here. We have shown by an unbroken mass of authority that can not be questioned that the defendant company must be able to point out the grant under which it claims. Nothing is to be taken by way of surmise, or guess-work, or on account of the lofty spirit of patriotism that may have actuated the grantee. Especially is this true when lands are sought to be taken from a private citizen who holds under a United States patent, based upon a military land warrant. A grant made to patriotic citizens on account of any uneasiness Congress may have felt as to England would certainly have been made with care and as full and complete as Congress intended or thought was necessary to meet the exigencies of the case. This mistaken condition at the time as to England's intentions, or, perhaps, the wholly disinterested patriotism of the projectors, can not be used at this time to enlarge the grant or so construe it as to make it embrace things that were not covered by its terms. Neither are we arguing against land grants or donations. What we object to is, that Mr. Harriman and his associates should be taken with a spasm of patriotism, nearly a half century after the war, that leads them to believe they have not heretofore claimed enough for agreeing to carry troops and munitions of war for a reasonable compensation. And we do not wish to be made the victims of this overflow of patriotism if we can avoid it.

Points insisted on by respondent in the lower court:

We take excerpts from the defendant's argument as filed in the lower court, pp. 67 to 71, showing its position:

(P. 67) "The words 'this act' are used throughout the act of 1864 in reference to the act of 1862 as amended by the act of 1864. This is evident from the very section under consideration." (Section 9.)

NOTE: We think we have shown conclusively that this is a mistake. We have shown that words referring to acts of Congress are used 43 times, and always with exactness.

(P. 67) "Section 9 gives authority to connect westwardly of the 100th meridian to any company authorized by THIS ACT to construct its road and telegraph line from the Missouri river to the initial point. *But the act of 1864 does not give such authority to any company. For that we* must look to the act of 1862."

NOTE: This is also a mistake. We have shown in sections 17 and 18 et seq. of the act of 1864 that it did give exactly such authority to the new Sioux City road and to the B. & M. R. R.

(P. 67) "Moreover, said section 9, after providing that for so much of the road as might be a departure from the original line, 'such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of THIS ACT,' proceeds as follows: 'Provided further, however, that the bonds of the United States shall not be issued to such company for a greater amount than as hereinbefore provided, if the same had united with the Union Pacific road on the 100th degree of longitude.' *Nowhere in the act of 1864 is there any bond aid whatsoever provided.* * * * * Congress had reference to the act of 1862."

NOTE: This is another mistake. The new Sioux City road, by section 17, was to take over the rights of the old branch, including the right to *bonds*. In order that there might not be any mistake made about the matter, Congress used this language in ref-

erence to said road: "And on the same terms and conditions as are provided in *'this act and the act to which this act is an amendment.'"* The section further provides that the company constructing said branch shall not be entitled to receive in *bonds* any larger sum than the Union Pacific would be entitled to receive if it had constructed it, under *this act and the act to which this is an amendment.* So that we see that defendants' objection is trebly answered by the act itself, and that when Congress intended to refer to the act of 1862 it expressly so stated.

(P. 67) "At the end of section 11 of the act it is provided that no land granted by *this act* shall be conveyed to any party or parties, etc. *But there is no land expressly granted by the act of 1864, and beyond question the reference is to the act of 1862,* as amended by the act of 1864."

NOTE: This is another mistake. 1st: It loses sight of the fact that there was more than double the amount of land granted by the act of 1864 than there was by the act of 1862. 2nd: All grants to the original companies were doubled. 3rd: The grant to the B. & M. R. R. was independent of the act of 1862; the B. & M. R. R. did not get *bonds,* but the new Sioux City route did, and its lands and bonds depended upon the grant made to it in 1864, although reference is made to the prior grant of 1862 to the old company.

(P. 67) "By section 16 of the act provision is made for the consolidation of 'any two or more companies authorized to participate in the benefits of THIS ACT. * * * After such consolidation they shall receive all and singular the grants, etc., * * * and be subject to the same terms and conditions, etc., which said companies respectively at the time of such

consolidation are or may be entitled or subject to under THIS ACT.' It is *perfectly evident that this* language refers to the grants, benefits and immunities * * * not solely of the act of 1864, but the entire body of legislation upon the subject."

NOTE: This is also a mistake. Congress meant exactly what it said when it used the term THIS ACT. The act of 1862 provided for the consolidation of the companies named therein (section 16). It provided for any company therein named, after it had finished its line, to work upon any branch, or even upon the main line, upon equitable terms.

Section 16 of the act of 1864 provides for the consolidation of the *new* companies that were brought in. In fact, its terms could not be extended to the companies provided for by the former act.

(Page 68) "By section 21 it is provided 'that, before any land granted by THIS ACT shall be conveyed to any company or party entitled thereto under THIS ACT, the cost of surveying, selecting and conveying the same shall be paid into the United States treasury,' etc. *But no lands are granted expressly by the act of 1864;* the reference, therefore, by the words 'this act' *must* be to the act of 1862, as amended by the act of 1864."

NOTE: We have already conclusively shown the defendant's mistake in this particular. But there is still another matter, not spoken of that proves it, and again proves that Congress meant exactly what it said. The act of 1862 provided that, as fast as the lands were earned, the government should survey and convey them to the several railroad companies. This selecting and surveying was found to be a heavy expense, and the act of 1864 provided that the recipients of its favors should pay this cost. This surely applied to the

whole grant to the B. & M. R. R. Co. and the new Sioux branch, and we read it as applying to that double portion that was given by the act of 1864 to the other companies. If it was aimed to apply to the lands granted by the act of 1862 it would be in direct conflict therewith, and would impair the obligation of the contract existing between the United States and the companies mentioned in the act of 1862.

(Page 69) "Finally, it may be said that if the words 'benefits of this act,' contained in section 9 of the act of 1864, did not extend the grant of *right of way* west of the 100th meridian, then equally and for the same reasons they did not extend the grant to the odd numbered sections to such portion of the line, for the two grants, so far as the extension of the branch lines west of the 100th meridian is concerned, *depend upon the same words and must stand or fall together.*

NOTE: We here have the defendant's contention embraced in very few words, and we answer:

First—That the *right of way* always being granted by distinct language, and being separate and apart from all subsidy grants, the claims of defendant that one carries the other, and that both are carried by this doubtful and indefinite word, "benefits," restrained again by the words, *"this act,"* cannot stand.

Second—But there is another equally strong proposition against it. *The act of 1864 did not grant any subsidy lands to any of these branches west of the 100th meridian.* The act of 1866 provided for *withdrawing* of lands along respondents' new route, but there was *no grant made* of the same until the act of 1869. If the act of 1864 made such a grant as is claimed, *what was the use of the acts of 1866 and 1869?* Surely, the Union Pacific proper had no

use for any such acts, and the K. P. R. R. had no use for either of said acts in relation to lands east of the 100th meridian. Upon the completion of so much work, patents passed to the K. P. for lands lying east of said meridian, but in lands west of said meridian it stands conceded that it became entitled to them only by the act of 1869. The truth is that up to 1869 the K. P. route was not fixed through the city of Denver to Cheyenne, and there was no certainty that the K. P. would not build to Albuquerque from the western boundary of Kansas. It had defined its route only to the western boundary of Kansas.

It is conceded by defendant that the last provision of section 9 cut off all bonds for its line west of the 100th meridian. This being true, how can it claim the grant of alternate sections of land west of the 100th meridian by virtue of section 9? The reading of the provision is quite plain:

"Provided further, however, that the *bonds* of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad at or on the 100th meridian of longitude; *nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."*

The alternate sections of land that defendant was to receive under the act of 1862 extended only to its junction with the Union Pacific at the 100th meridian. By the act of 1864, the amount of land was doubled for its line up to said point, *but no further.* This section as clearly limits the lands it was to receive as it does the bonds. Nothing of the kind extended west of said point, *and there was no*

grant of any right of way west of said point. It is confessed by the defendant that *if it did not obtain subsidy lands clear through to Denver, and north from there to Cheyenne, by the act of 1864, then* IT DID NOT OBTAIN ANY RIGHT OF WAY BY SAID ACT.

We think it is equally clear that the word *"benefits of this act"* was never used in reference to "bonds," or "subsidy lands," or "right of way."

The court below seems to have been misled by two contentions made by the defendant; first, that section 9 of the act of 1864 should be read into section 9, of the act of 1862. There are parts of the act of 1864, such as striking out one number and inserting another, etc., that may very properly be so read. But this would be impossible as to section 9, for it is independent legislation, and its sense can only be properly arrived at by considering the acts separately.

2. By so reading, the defendant arrives at this conclusion (page 60):

"The law read on July 2nd, 1864, that the *Leavenworth P. & W. R. R.* was authorized to construct its railroad *so as to connect* with the main line of the U. P. *either* at the 100th meridian or at *any point westwardly* thereof, if said company should deem said westward connection more desirable, and that said line should be constructed *upon the same terms* and conditions in all respects as the main line."

And it says:

"Upon this language is it not clear that from and after after July 2nd, 1864, *appellee* was authorized to construct its line so as to connect with the main line of the Union Pacific, at *any point* between the 100 meridian and the *western boundary of Nevada*, and that in *aid* of the construction thereof the *right of way* was granted?"

(a) We claim that the law did not read on July 2, 1864, and cannot be made to read, so as to allow all of said branches to join at the 100th meridian or build to the Nevada western line at their option.

(b) Defendant declares the act of 1864 to have been simply an option, to be availed of by filing a map, which never was filed.

(c) It matters not that branches might build westardly, they could not build indefinitely, but are confined to a junction at or near the 100th meridian.

(d) The words "*upon the same terms* and conditions" are not in the act of 1864, but defendant transposes and attaches them to the provisions of that act, when the act by express words denies subsidy lands and bonds in aid of such departure, and leaves defendant without any grant of right of way.

(e) The "benefits" of the act of 1864, or *this act*, does not embrace any benefits of the acts of 1862.

(f) By the clear language of the act, the K. P. R. R., or those made branches under the act of 1862, were not embraced with those that might build westwardly. The privilege is confined to those roads that were *authorized* by the act of 1864, etc.

Some of the particular "benefits" granted by the act of 1864 were: eminent domain within their respective grants; the doubling of the land grant for each road to the extent of its line; the extending of time to file maps of definite location; the right to bridge navigable rivers. These matters apply directly to those companies embraced in the act of 1862, except that section 3, of the act of 1864, gives the right of eminent domain by express language to the new companies also.

Again we ask, *is it not clear, as stated in section 9, that the right to build westwardly was confined to the companies "authorized by* THIS ACT *to build from the Missouri river to the 100th meridian," and that the K. P. R. R. is not in that class at all?*

MINOR ERRORS IN THE OPINION OF THE COURT OF APPEALS.

We do not wish to be considered as raising quibbles concerning the opinion of the lower court. On the other hand, we do not wish to concede as law that which to our minds is not the law. We will briefly point out a few of these additional mistakes, believing that Your Honors will be surprised, upon reading the record, that the lower court reached the conclusions it did.

First. It is is said that, at the commencement of this action, no one was in possession of the 160-acre tract, save the small strip occupied by the defendant. The court evidently confounds *possession* with *actual occupancy.* To our minds the authorities are too clear on this point to need further notice.

Second. The court says there was "some evidence" of the filing of maps * * * showing the general route from the eastern Colorado line to Denver. * * * *But none of the maps,* or any better statement of what was shown therein, *were offered in evidence."*

Extra official or extra judicial statements or certificates are never received in evidence of the facts stated therein.

1st Greenleaf on Evidence, section 498.

U. S. vs. McLaughlin, 30 Fed., 147.

Surely, the letter of a president of a railroad company, giving his opinion, is not evidence. We have shown that no such map exists (Ford, Register of land office, Record, pages 62 to 64; Stuart, Record, page 36). But if this map is what is claimed for it, why not produce it, or a certified copy of it?

Third. The court finds that *both* parties paid the taxes on the land in dispute. That the plaintiffs paid *all* the taxes, from the year 1866 up to the present, is admitted. It is not disputed that, under sections 2923, 2924 and 2926, Mills' Ann. Statutes of Colorado, this would give them perfect title, even as against an actual grant of right of way to defendant.

Union Pacific R. R. Co. vs. Peniston, 18th Wallace, 5. Thompson vs. Union Pacific R. R. Co., 9th Wallace, 579.

We do not believe that Your Honors will be able to say that there is *one word* of competent evidence on the part of the defendant showing that it ever paid any taxes on this land. (Record, pages 125, 126 and 127.) Besides, the act that allowed it to make its return to the state board of equalization was not passed until 1902.

Revised Statutes (Colo.), section 5652.

Fourth. It is said that the owners of the tract did not insist that the railroad should not be constructed until compensation was made. Please read the opinion of the Supreme Court of Colorado as to the mental condition of Adams (the owner) at that time, and introduced in evidence herein. (Record, page 32.)

Warren vs. Adams, 19 Colo., 515.

Fifth. It is said that in the courts of the United States a suit to quiet title can not be maintained by

a complainant who is not in possession, against a defendant who is in possession, because there is a plain, complete and adequate remedy at law. This is true of suits originally brought in the United States courts, because the old equity practice of those courts, which embraces this rule, may properly be enforced as against the party applying to that court for redress. But it is not true where the case was originally brought in a state court, to enforce a remedy clearly given by a state statute, and which is transferred to the U. S. courts upon the petition of defendant. In such a case, the U. S. courts give the relief that the state court could have given under the statutes of the state. Otherwise we would have judicial anarchy.

Ely vs. New Mexico & A. R. Co., 9 Sup. Ct. Rep., 293.

Holland vs. Challen, 110 U. S., 16.

More vs. Steinbach, 8 Sup. Ct. Rep., 1072.

Gray vs. Kaufman, 10 Sup. Ct. Rep., 406.

Arndt vs. Griggs, 10 Sup. Ct. Rep., 557.

Roberts vs. N. U. R. R. Co., 15 Sup. Ct. Rep., 765.

We have hastily presented the main question in the case, and we claim the right to reply to any further argument made by the respondent.

THOMAS B. STUART,
CHARLES A. MURRAY,
LOUIS T. MICHENER,
PERRY G. MICHNER,
Attorneys and Solicitors for Petitioners.

JOSEPH C. HELM,
Of Counsel.

In the Supreme Court of the United States.

October Term, 1910

No. 694

THOMAS B. STUART and CHARLES A. MURRAY,
Plaintiffs and Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant and Respondent.

PETITION.

To The Honorable The Supreme Court of the United States:

The petition of the said Thomas B. Stuart and Charles A. Murray respectfully shows to this Honorable Court as follows:

That on the 18th day of June, 1866, one Erastus Eastman preempted under the laws of the United States

the E. ½ of the NW. ¼, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼ of Sec. 20, Twp. 3, S. R. 67 W., situated in Arapahoe County, Colorado, and being the 160 acres of land described in the bill of complaint herein. That said preemption was carried by him to a cash entry on the 2nd day of January, 1867, and a patent issued to him from the United States for said land, and he thereby became the absolute owner in fee simple of all of said land, his title dating from the day of its initiation, June 18, 1866, as aforesaid.

That on or about the 4th day of January, 1867, said Eastman, for a valuable consideration, sold and conveyed said land to one Andy M. Adams. That the said Adams became and continued insane from 1868 up to about the year 1890. That said insanity has been heretofore judicially found and determined by the Courts of Colorado, including the Supreme Court of said State.

That petitioners, on or about the 21st day of January, 1892, became the owners of an interest in said lands, and afterwards, and just before the bringing of the action herein to quiet title, they became, and have ever since remained, the sole and absolute owners of said land, and have, through their predecessors and themselves, ever been in possession thereof, and have paid all taxes thereon since the date of the entry aforesaid. That in the year 1870 the Kansas Pacific Railroad Company (a corporation) without any authority of law, and while the owner of said land was insane, entered upon said land and constructed a railroad track over a portion of the same.

That on the..... day of ....., 1906, petitioners brought their action herein against said

Kansas Pacific Railroad Company, Union Pacific Railroad Company, and others, in the District Court of the State of Colorado, in and for the Second Judicial District thereof. That thereupon the said respondent, Union Pacific Railroad Company, on its own behalf and as the successor to all the interest of the Kansas Pacific Railroad Company, procured the transfer of said cause of action to the Circuit Court of the United States, in and for the District of Colorado, on the ground of diversity of citizenship, alleging it was a citizen of Utah.

That still later, said Company by its answer in said case set up title to a strip of land four hundred (400) feet in width as a right-of-way across said land, basing its right thereto under pretended grants claimed by it to exist in certain Acts of Congress, towit: Act of July 1, 1862 (12 Stat., page 489), and Act of July 2nd, 1864 (13 Stat., page 356), and Act of July 3, 1866 (14 Stat., page 79), and Act of March 3, 1869 (15 Stat., page 324).

Petitioners allege that no such right, or any right, in regard to right-of-way, on said land has ever existed in favor of the respondent, or any of its grantors, by virtue of either or all of said acts of Congress.

That upon the hearing of said cause before the Court of Appeals, the respondent based its principal right to recover upon the Act of 1866, as aforesaid, claiming that the title of Eastman, although it had been initiated fifteen days prior to the passage of said Act, did not become perfect by patent until after the passage of said Act, and that said Act not only gave it the right-of-way, but destroyed all initiatory rights of the said Eastman in and to said lands. That the Court of Appeals held in its opinion in said cause, rendered on the 2nd day of May, 1910, that the respondent gained

nothing by the Act of 1862, or by the Act of 1866; that the title of Eastman, being initiated prior to the Act of 1866, was superior to all claims of the respondent under the Act of 1866, but that the respondent was, *by implication*, granted a right-of-way four hundred (400) feet wide across said land in controversy, by the Act of 1864. A certified copy of the entire record of the said cause in the Circuit Court of Appeals is herewith presented as a part of this application, in conformity with Rule 38 of this Honorable Court relative to cases from Circuit Courts of Appeals, and the same is marked Exhibit "A".

Your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous; and this Honorable Court should require the said case to be certified for its review and determination and in conformity with the provisions of the Sixth Section of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891," the case being made final in the Circuit Court of Appeals by the said Act.

In support of this application for a writ of certiorari to secure a review of said judgment and decision by this Honorable Court, your petitioners respectfully urge the following reasons:

1st. The decision of the Court of Appeals casts serious doubt upon, and is in conflict with, the conclusions recently reached by the Supreme Court of the United States, in the case of Union Pacific Railroad Co. vs. Harris, 215 U. S., page 386. That said Court of Appeals flatly rejects the declaration of the Supreme Court of the United States in said case that the Con-

gressional Act of 1866 was the first Act affecting the Union Pacific, Eastern Division, west of the 100th meridian. And, by a somewhat unusual course of reasoning, the views of this Honorable Court, as aforesaid, were rejected, and a view directly contrary to that taken by it was adopted by said Circuit Court of Appeals, and was enforced by it in this action. That this feature is exceedingly important in the present case, for the reason that the Harris decision, in effect, gives precedence to the Eastman filing and thus takes this tract of land from under the operation of any and all Congressional right-of-way provisions that could exist. That under the decision in the Harris case (which in this respect is followed by the Court of Appeals), the lands in controversy herein ceased to be "public domain" from the date of Eastman's preemption filing, towit, June 18, 1866, and therefore could not be operated upon by the Act of July 2, 1866, or any subsequent Act.

2nd. That the question raised in this case, namely, whether the Union Pacific Railroad Company is entitled to a right-of-way four hundred (400) feet wide, or any right-of-way, is involved in many cases now pending in the States of Kansas, Nebraska and Colorado. That the case of your petitioners is the pioneer case in Colorado, and the decision of the Court of Appeals herein covers all such cases and becomes conclusive of each of them in said Court of Appeals. That the contention thus advanced in these cases affects many millions of dollars worth of property, and the homes and other interests of thousands of innocent settlers, and the pendency of those cases, and such other cases as will certainly be brought under said opinion of the Court of Appeals, has created and will hereafter create great uncertainty, and will seriously affect titles by United States patent

that had stood unquestioned by the respondent for over forty years. That, if the decision of the Circuit Court of Appeals in this case is allowed to stand as a precedent, it will, in the City of Denver alone, give the Company a strip of land four hundred (400) feet in width from the outside of said City to about the center thereof, and out of said City again on the line toward Cheyenne. That at no time prior to the bringing of this case has said respondent ever claimed a right-of-way over one hundred (100) feet in width through the said lands of the petitioners, or any of the other lands referred to herein. That for over forty years it has stood by and seen cities and towns built upon said lands, and other valuable improvements made thereon, without making any claim whatever thereto on its part.

3rd. That it has been held by this Honorable Court from the earliest date (Railroad v. Baldwin, 103 U. S. 428), that a grant of a "right-of-way" is a distinct and separate thing from all grants of subsidy, or subsidy lands, and is not to be controlled or measured by language in reference to them. That it has also been held by this Court in Leavenworth Railroad v. U. S., 92 U. S. 733, and in many cases following said decision, that "all grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the Acts of Congress * * * they must be plainly expressed in the Statutes, and, if not so expressed, they cannot be implied." That all doubtful language will be construed against the grantee, and "what is not given expressly or by necessary implication is withheld." Whereas, in the case at bar, it is not claimed that there is any *expressed* grant of the right-of-way west of the 100th

meridian, but that it is to be *inferred* from doubtful language used in reference to other matters. Petitioners therefore allege that the opinion of the Court of Appeals is subversive of all said decisions of this Honorable Court.

4th. That, if the premises of the Court of Appeals should be granted, namely, that the Act of 1864 gave the Kansas Pacific Railroad Company the *option and election*, and no more, to (a) "meet and connect with Union Pacific at the 100th meridian," as it was required expressly to do by the Act of 1862, or (b) when it arrived at said meridian to take over to itself the unused right-of-way of the Union Pacific Railroad and build thereon to a connection with the Central Pacific, or (c) to build a line parallel to that of the Union Pacific for the entire length of said road west to within a few feet or rods of where said Union Pacific joined the Central Pacific,—then there is no showing that the Kansas Pacific Railroad ever acted upon or accepted either of these options which are said to have been granted by the Acts of 1864 as to its building "westward," but, directly to the contrary, said Kansas Pacific Railroad Company filed its map along its old line, uniting with the Union Pacific *at the 100th meridian*, as was decided by this Court in M. K. & T. Ry. Co. v. K. P. Ry. Co., 97 U. S., pages 491-494, and this is the only map it ever filed under the Act of 1864. That, although its said map was never approved by the President, it nevertheless conclusively shows an adherence to the old line adopted by the Kansas Pacific Railroad and its grantors under the Act of 1862. The Court of Appeals opinion also ignores the necessity of any affirmative showing on the part of the respondent that it did make definite location of its road, or file maps thereof, within the time

provided in each of said Acts of Congress for it to do so. Petitioners allege that it has been repeatedly determined by this Court that it devolves upon railroad companies, claiming under such Acts of Congress, to show a compliance therewith, and that the definite location of road by the necessary maps can only be avoided by showing actual construction thereof along the line claimed as right-of-way, prior to the initiation of the rights of others. That the definite location of a railroad by maps, or its actual construction as aforesaid, is a condition precedent to the obtaining of any right-of-way over specific lands. That this would be especially true in regard to an option granted in reference to different routes. That there must be a definite location made by the Act itself, or by proper maps, is distinctly decided in the Harris case, and in many other cases in this Court. That, according to all the decisions in this court, it rested upon the respondent herein, when it would defeat a patent of the United States, to show definitely and affimatively its title to the land by every act that was necessary to make out a title superior thereto.

5th. The decision of the Court of Appeals construes the Act of July 2, 1864, into a grant of a right-of-way *with but one terminal.* That act provided (Section 9) that any company authorized to construct "from the Missouri River to the *initial point* (on the 100th degree of longitude) may construct its road and telegraph line so as to connect with the Union Pacific Railroad *at any point westwardly of such initial point*, in case such company shall deem such westward connection more practicable or desirable."

If this language constitutes a grant of right-of-way, then it was such a right-of-way as was never known

elsewhere. It was a right of way fixed at its eastern end, but capable of being located at its western end at any point along the main line of the Union Pacific within about 1500 miles. It was almost as movable and uncertain as the shifting shaft of a search-light which turns on a pivot at one end and sweeps through all space at the other.

Pending the final decision of the railroad company as to what point of connection might be "practicable or desirable," any settler in all that vast western country ran the risk of losing his home through this indefinite, optional, shifting, uncertain and void right-of-way, that had no western terminal, and no indicated path.

Petitioners deny that the Act of 1864 ever granted permission to the Union Pacific, Eastern Division, to build west of the 100th meridian, or that any right-of-way was granted it for said purpose.

6th. That, in this particular case, unless petitioners can invoke the writ of certiorari, they are left remediless, the decision of the Court of Appeals will become final as to them, and they will lose their property, even though this Honorable Court should later, by following the Harris case, take a different view of the law, and should eventually, in other cases, overrule the Court of Appeals. Thus petitioners will be deprived of a hearing before this court, when, by law, and without any fault on their part, they were, but for the act of the defendant, unquestionably entitled to such a review. This cause was originally brought in the State Court of Colorado, a Court which had full jurisdiction of the subject matter and of the parties. And had the cause remained in that Court, it would doubtless have reached this Honorable Court through a final decision of the Supreme Court of the State of Colorado. But defendant, by petition, removed

the cause to the United States Circuit Court, thus exercising the right it possessed as a citizen of another State. The appeal from the latter court lay in the first instance only to the Circuit Court of Appeals, and the case is of such a nature that the decision of the Court of Appeals is final, unless petitioners can obtain relief herein by certiorari.

7th. The petitioners are unable to appeal, because no Federal question was stated in the original bill filed in the State Court, although, upon removal to the Federal Court, and in the answer there filed, respondent at once pleaded a Federal question, which became the sole ground of controversy. So that, under the Statutes, rules and practice, petitioners have no adequate remedy at law by an appeal; notwithstanding the fact that where a Federal question is the main ground of controversy, and happens to be stated in the original bill, an appeal would lie to this Court from the Circuit Court of Appeals,

WHEREFORE, Your petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eight Circuit, commanding the said Court to verify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, "Thomas B. Stuart and Charles A. Murray, appellants, v. The Union Pacific Railroad Company, respondent and appellee, No. 3033," to the end that the said case may be reviewed and determined by this court, as provided in said Section 6 of the said Act of Congress aforesaid; and that your petitioners may have such other or further relief or remedy in the premises as to this

Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And thus your petitioners will ever pray.

THOMAS B. STUART,
CHARLES A. MURRAY,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys and Solicitors for Petitioners.

JOSEPH C. HELM,
Of Counsel.

State of Colorado, City and County of Denver, ss.

Thomas B. Stuart and Charles A. Murray being first duly sworn, upon their oaths severally say that they are the petitioners above named, that they know the contents of the foregoing petition and that the same are true to the best of their knowledge and belief.

THOMAS B. STUART.
CHARLES A. MURRAY.

Subscribed and sworn to before me, this, the 9th day of Sept., 1910.

My commission expires the 28th day of January, 1911.

ROY C. HECOX,
Notary Public.

BRIEF OF PETITIONERS ON APPLICATION FOR CERTIORARI.

Sec. 6 of the Judiciary Act of March 3rd, 1891, declares:

"That the Circuit Court of Appeals established by this act shall exercise appellate jurisdiction, etc., * * * and the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or *citizens of different States.* * * * And excepting also that in any such case as is herein before made final in the Circuit Court of Appeals it shall be competent for the Supreme Court *to require, by certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

4 Fed. Stats. Annotated, p. 409.

IN WHAT CASES THE WRIT WILL ISSUE.

In Lau Ow Baw vs. United States, 144 U. S. 47, 12 Supreme Court Reporter 517, the Court, by Chief Justice Fuller, held that review by *certiorari* is resorted to "in the interest of *Uniformity of Decision,*" among other things.

See also *United States* vs. *The Three Friends,* 165 U. S. 721; 17 Supreme Court Reporter 495.

Forsyth vs. *City of Hammond,* and cases therein cited, 166 U. S. 506, 17 Supreme Court Reporter 665.

The Conquerer, 166 U. S. 110, 17 Supreme Court Reporter 510.

Generally, on review by the Supreme Court by writ of *certiorari,* see 4th Federal Annotated Statutes, pages 420, 421.

Diversity of Citizenship. The case will be determined on the record certified.

McClellan vs. *Carland*, 30 Supreme Court Reporter 501.

St. Louis K. C. R. Co. vs. Wabash R. C., 30 Supreme Court Reporter 510.

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SUPREME COURT, U. S.
FILED.
OCT 8 1910
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. ~~358~~ 135

THOMAS R. STUART AND CHARLES A. MURRAY,
PETITIONERS.

vs.

UNION PACIFC RAILROAD COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF OPPOSING PETITION.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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PETITIONERS.

VS.

UNION PACIFIC RAILROAD COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF OPPOSING PETITION.

We have been served with notice that on Monday, the 10th day of October, A. D. 1910, the petitioners above named would apply to the court for the issuance of a writ of *certiorari,* whereby a review of the judgment of the Circuit Court of Appeals in the above-entitled cause might be had by this court. Accompanying said notice were copies of said petition and of the petitioners' brief in support of the same. By the service of said notice, petition and brief we

assume that an opportunity is thereby afforded us to file a brief, or make such other showing as we may deem proper in opposition to the granting of the petition and the issuance of the writ of *certiorari*. Accordingly, we beg the court's consideration of the following reasons and authorities, which seem to us persuasive that the petition should be denied.

The present application is undoubtedly made pursuant to that portion of the Court of Appeals act which, after giving to the Circuit Courts of Appeals final jurisdiction in certain cases, and, after providing for the certifying by said courts of questions to the Supreme Court for its decision, proceeds as follows:

> "And excepting, also, that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."
>
> 26 U. S. Statutes, 828, section 6, clause 2 (U. S. Comp. Stat., 1901, page 550).

It is hardly necessary for us to repeat what has been already many times said by this court, that the Circuit Courts of Appeals were created, and their jurisdiction determined, by act of Congress, for the purpose of relieving the Supreme Court of the United

States of the increasing burden of general litigation, which necessarily delayed suitors in the pursuit of justice, and hampered the Supreme Court in its disposition of litigation of great public moment. Such undoubtedly was the purpose of the act of Congress. For this reason the provision of the act above quoted, which invests the Supreme Court of the United States with power to issue writs of *certiorari* for the purpose of reviewing judgments of the Circuit Courts of Appeals in cases wherein, by the act of Congress, the jurisdiction of the Courts of Appeals is made final, is to be exercised cautiously and sparingly, otherwise the purpose of the Congress in enacting the statute would be defeated, and this court would again assume the burden of which it was relieved by the creation of the Court of Appeals. That the issuance of the writ of *certiorari* in such cases is governed by the considerations stated above, is evidenced by the fact that, although numerous applications have been made for the writ since the passage of the act, the writ has been granted in a few cases only, and in each instance the issuance of the writ is to be justified upon special grounds, which do not appear in the case at bar.

As was said by the chief justice in Lau Ow Bew, Petitioner, 141 U. S., 583, at 587:

> "It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction, and that it is only when such questions are involved that the power of this court, to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly in-

> voked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for, in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

When, after the issuance of the writ of *certiorari* in the case last cited, the matter came on for hearing at large, the opinion was delivered by the chief justice, and is reported in 144 U. S., page 47. In the course of the opinion the chief justice remarks:

> "The act of Congress of March 3, 1891, establishing Circuit Courts of Appeals and defining and regulating the jurisdiction of the courts of the United States (26 Statutes, 826 C., 517), was passed to facilitate the prompt disposition of cases in this court, and to relieve it from the oppressive burden of general litigation which impeded the examination of cases of public concern and operated to the delay of suitors."

After analyzing the provisions of the statute in respect to the jurisdiction of the Circuit Courts of Appeals, and the practice of certifying questions to the Supreme Court, and of the issuance by the Supreme Court of the writs of *certiorari,* the chief justice proceeds, on page 58:

> "And as *certiorari* will only be issued where questions of gravity and importance

> are involved, or in the interest of uniformity of decision, the object of the act is thereby attained."

In American Construction Co. vs. Jacksonville Railway, 148 U. S., 372, the opinion was by Mr. Justice Gray. Referring to the Court of Appeals act he says, on page 382:

> "The primary object of this act, well known as a matter of public history, manifest on the fact of the act, and judicially declared in the leading cases under it, was to relieve this court of the over-burden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation; and for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals, thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States."

And again, on page 383 of the same opinion, Mr. Justice Gray says:

> "In the same spirit the authority conferred on this court by the very provision on which the petitioners mainly rely (that relating to *certiorari*) has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity

> and general importance, or in order to secure uniformity of decision. * * * Accordingly, while there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted: The one in Lau Ow Bew's case, above cited, which involved a grave question of public international law affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second circuit reversed a decree of the district judge, and was dissented from by one of the three circuit judges, and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court."

In Forsyth vs. Hammond, 166 U. S., 506, Mr. Justice Brewer, delivering the opinion of the court, says, in respect to this provision of the law (page 513):

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the Courts of Appeal. So exercised, it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would

simply prevent that promptness of decision which, in all judicial actions, is one of the elements of justice.

"So it has been that this court, while not doubting its power, has been chary of action in respect to *certioraries*. * * *

"We reaffirm, in this case, the propositions heretofore announced, to wit, that the power of this court in *certiorari* extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And, further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Applying the principles thus clearly laid down in previous decisions of this court, we submit that the case at bar does not present any of the features which require, authorize or justify the issuance of the writ of *certiorari*.

The rules of this court provide that, when an application of the character under consideration is made, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished by the applicant as a part of the application. (Rule 37, Subdivision 3.)

We take it for granted that this rule has been complied with. By a perusal of the record thus furnished, it will readily be seen that the case does not fall within any of the classes hitherto regarded as appropriate ones to call for the issuance of the writ. We presume that the opinion in the Circuit Court of Appeals is annexed to the record; if not, it will be found published in 178 Fed. Rep., at 753. From the record it appears that there was no refusal of the court below to certify the question involved to this court for its decision, for no request for such certification was ever made. From the opinion it appears that there was no diversity of conclusion among the learned judges of the Circuit Court of Appeals, for the three judges who heard the argument concurred in the opinion. Not only was there no diversity of opinion among the judges of the Circuit Court of Appeals, but, in addition, their judgment was in entire accord with that of the learned district judge who presided at the trial in the Circuit Court, and the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals.

There is no question here of avoiding conflict between two or more Courts of Appeals, or between Courts of Appeals and the courts of a state. Clearly, the matter involved is not one affecting the interests of this nation, either in its internal or external relations, for the sole question is as to the proper con-

struction of an act of Congress of limited and local application.

We have thus, we think, shown that none of the features exist in this case which have hitherto been assigned by this court as reasons for the issuance of the writ of *certiorari*, and that the case clearly does not fall within any of the enumerated classes which this court has heretofore specified as being the proper ones for the exercise of the power in question. The point involved in the case can not possibly be of interest outside some portions of the states of Colorado and Kansas, for the reason that it is dependent upon the construction of a statute which is applicable nowhere else.

We submit it to be clear, therefore, that the question involved is not of such gravity or importance, or of such national concern, as to demand the exercise of the power of this court to issue the writ of *certiorari*, to the end that the judgment of the Circuit Court of Appeals, in this particular case, may be reviewed, and with the effect of burdening this court with a controversy of which it was the purpose of Congress to relieve it, and thereby delaying the determination of other important matters within the usual appellate jurisdiction of this court.

In a very similar case to the one at bar this court has heretofore refused to issue the writ. We refer to In re Woods, Petitioner, 143 U. S., 202. In that case the Circuit Court of Appeals had made certain determinations in respect to whether a judgment of dismissal in a former suit was, or was not, a bar to a second suit upon the same cause of action; and also, in respect to the principles governing the recovery by a servant against his master for injuries received

in the course of his employment, by the negligence of a fellow-servant—both questions of general application and of general interest in the state of Minnesota. In the course of the opinion the chief justice, after remarking that the power to issue the writ of *certiorari* was to be invoked only when questions of gravity and importance were involved, goes on to say (page 205:

> "This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice. But, in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section 6 for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters. * * * But we do not regard the inquiry as to whether it was settled law in the state of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment, was properly applied on the trial of this case,

as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them. The writ of *certiorari* is denied."

No new principle is involved in the decision of the Circuit Court of Appeals. The principle and its application to the precise line of railroad here involved were settled and determined by a series of decisions in this court, beginning more than thirty years ago:

M., K. & T. Ry. Co. vs. Kansas Pac. Ry. Co., 97 U. S., 491, 494.

United States vs. Kansas Pac. Ry. Co., 99 U. S., 455, 457.

Railroad Company vs. Baldwin, 103 U. S., 426.

Bybee vs. Oregon & Cal. Ry. Co., 26 Fed., 586, 588, 589.

Bybee vs. Oregon & Cal. Ry. Co., 139 U. S., 663, 674, 679.

Smith vs. Northern Pacific, 58 Fed., 513, 515.

Northern Pacific vs. Smith, 171 U. S., 260, 267.

Northern Pacific vs. Ely, 197 U. S., 1, 5.

Northern Pacific vs. Hasse, 197 U. S., 9, 10.

Kansas Pac. Ry. Co. vs. A., T. & S. F. Ry. Co., 112 U. S., 414, 416, 417, 418.

Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S., 629, 633.

The acts of Congress here involved (which acts and acts of exactly similar import were construed in the foregoing decisions) are as follows:

Act of July 1, 1862 (12 Statutes, 489).
Act of July 2, 1864 (13 Statutes, 356).
Act of July 3, 1866 (14 Statutes, 79).

Under the authority of the foregoing decisions, and in reliance upon the plain provisions of the acts of Congress, the Kansas Pacific Railway Company and its successors, including the present respondent, have from the beginning claimed a right of way 400 feet in width for the entire line, including that portion of the same lying west of the 100th meridian, and have based that claim upon the acts of 1862 and 1864. The act of 1866 did nothing more than extend the time within which a map of general route might be filed. This claim by the railroad has always been well understood by the inhabitants of the country, and, except in rare instances, has not been disputed. The right of respondent to this 400-foot strip throughout the entire length of the Kansas Pacific line, and the initiation of such right, not later than the act of Congress of July 2, 1864, is now and for years has been well known to, and admitted by, the owners of adjacent lands, except in a few isolated cases, such as that of the petitioners. The question involved can not possibly be of any interest except to land owners along that portion of the Kansas Pacific line west of the 100th meridian (which is, approximately, Fort Riley, in Kansas); it can not be of interest to any of such land owners except such as have titles initiated subsequent to the act of July 2, 1864, and prior to

the act of July 3, 1866; it can not be of interest to any of such land owners except the very few (of whom the petitioners in this case constitute the major part) who choose or are at liberty to dispute the settled and recognized title of the Railroad Company.

It follows that the question involved is not one of general interest or importance. It can not possibly be of interest except to a very limited number, of an exceedingly small class, of the inhabitants of a closely restricted territory in the western part of Kansas and the eastern part of Colorado. We submit that under no view of the case can it be regarded as one which appeals to the discretion of this court in the matter of the issuance of the writ of *certiorari*.

But in their petition and in their brief petitioners have assigned certain specific reasons why, in their judgment, the writ should issue. We now take these up in their order:

First—The petitioners aver that the decision of the Circuit Court of Appeals is in conflict with conclusions reached by this court in Union Pacific Railroad Company vs. Harris, 215 U. S., 386. The opinion in the Harris case was delivered by Mr. Justice Brewer. The precise portion thereof relied upon by petitioners occurs on page 389, as follows:

> "Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it."

Petitioners point to these words as a conclusive determination that the act of 1864 did not authorize the construction of a line west of the 100th meridian (approximately Fort Riley, in Kansas). But let us see what was involved in the Harris case. There the settler's rights were initiated by the filing of his declaratory statement on May 13, 1861. He maintained his possession continuously from that date until final proof and entry, and when patent was issued to him on March 15, 1872, his title related back to the date of filing of the declaratory statement.

Ross vs. Sinclair, Copp's Public Lands, 318.

Watson vs. Railway Co., 3 Land Owner, 7.

In re Edward Young, 9 L. D., Dept. Int., 32.

Ames vs. Bales, 17 L. D., Dept. 547.

It follows that the lands in question were not public lands at the date of any of the Pacific Railroad acts—from that of 1862 to that of 1866, both inclusive—and, therefore, the grant of right of way made by any of said acts could not attach thereto. Therefore, it was wholly immaterial which act made the grant.

The question whether the construction of the line west of Fort Riley was authorized by the act of 1864 or by that of 1866 was irrelevant to the discussion, and its determination could not affect the decision. It follows that the language of Mr. Justice Brewer, relied upon by petitioners, was a mere observation, not a ruling; a mere dictum, not a decision.

The oft-quoted language of Chief Justice Marshall, in Cohens vs. Virginia (6 Wheat., 264, at 399), is peculiarly applicable here:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The point that the act of 1864 authorized the construction of the line west of the 100th meridian had been definitely decided by this court on at least two occasions long prior to the decision in the Harris case.

In Missouri, Kansas & Texas Railway Co. vs. Kansas Pacific Railway Co., 97 U. S., 491, at 494, it was held that the amendatory act of 1864

> "authorized the plaintiff (the predecessor of the respondent here) to construct its road and telegraph line so as to connect with the Union Pacific road at a point west of its initial point (the 100th meridian) in case it deemed such westward connection more practicable or desirable."

In United States vs. Kansas Pacific Railway Co., 99 U. S., 455, at 457, it was held:

> "The authority of the company (predecessor of the respondent here) to extend its road west of the one-hundredth meridian was derived from the ninth section of the act of 1864, which declared as follows:
>
> "'And provided further, that any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act. Provided further, however, that the bonds of the United States shall not be issued to such company for a greater amount than as hereinbefore provided, if the same had united with the Union Pacific railroad on the one-hundredth degree of longitude, nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.'
>
> "It thus appears that whilst the company was authorized to extend its road west

of the one-hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did it was not to expect or have any subsidy of government bonds for such extension. It is found by the court that the company actually extended its road westward as far as Denver, 245 miles west of the one-hundredth meridian; but did not complete the same to that point so as to be accepted by the president until the 19th of October, 1872. * * *

"From a careful examination of the statutes relating to the subject, we are of opinion that whilst, as to the entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act'; and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet, that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one-hundredth meridian, are a lien on that portion only; and that the five per cent. of the net earning is only demandable on the net earnings of said portion."

The opinion of the attorney general, and the debates in Congress quoted in the opinion of the Circuit Court of Appeals in this case (178 Fed., 760 and 761) clearly show that the construction of the act of 1864, plainly announced by this court in the above mentioned cases, had prevailed from the beginning.

and it has ever since been and is now everywhere recognized and acted upon.

As was said by this court, referring to the same acts of Congress in United States vs. Burlington & Missouri River Railroad Co., 98 U. S., 334, at 341:

> "That the amendment of the act of 1864, enlarging the grant of 1862 to the Union Pacific Company, was intended to apply to the grants made to all the branch companies, there can be no doubt. All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place the Union Pacific Company and all its branch companies upon the same footing as to land, privileges and duties to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all the departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

In view of the previous decisions of this court, by which the question is definitely settled; in view of the uniform construction placed upon the acts of Congress in conformity with said decisions; in view of the fact that the point was not involved in the Har-

ris case; and in view of the fact that, as shown by the record and briefs in the Harris case, the point was not presented or in any manner discussed, we submit that the words of Mr. Justice Brewer, relied upon by the petitioners, cannot possibly be taken as evidencing the deliberate judgment of this court, in conflict with its prior rulings, and in reversal of a construction of the acts which has prevailed more than forty years.

We submit it to be clear that the decision of the Circuit Court of Appeals, instead of being in conflict with prior decisions of this court, is in exact conformity therewith.

Second. But petitioners assert that the question raised in this case is involved in many cases pending in the states of Kansas, Nebraska and Colorado; that the point decided involves title to property worth many millions of dollars and the homes and other interests of thousands of innocent settlers; that the decision of the Circuit Court of Appeals will give to the railroad company a strip of land 400 feet in width through the city of Denver; that at no time prior to the commencement of this suit has the railroad company ever claimed a right of way over 100 feet in width.

There is nothing in the record about any of these matters; none of them is true in point of fact; but if petitioners may go outside of the record for the purpose of making misrepresentations, we claim the right to do the same thing for the purpose of correcting them.

No case has arisen or can arise in the state of Nebraska involving this question, for the reason that

the line of the Kansas Pacific does not traverse any part of that state. We have already shown that the portions of Kansas and Colorado, the lands therein situate, and the owners or claimants of said lands by any possibility involved or affected, are exceedingly limited in extent or number. The claim apprehended regarding the city of Denver has never been, and cannot under the law, be made. The respondent and its predecessors in title from the beginning have always consistently claimed and insisted upon a strip of land for right of way for the entire line 400, not 100, feet in width, and this claim has been advanced at all times since the passage of the acts of Congress, and has been based upon the acts of 1862 and 1864, and not upon that of 1866. Whatever laches or seeming acquiescence may have occurred in isolated instances was probably due to inadvertence of local officers, agents and employes; in any event, it was ineffective. The right of way granted by these acts of Congress was inalienable and could not be lost or impaired by laches, acquiescence, any form of estoppel or the acts or omissions of officers, agents or employes, however long continued.

Northern Pacific vs. Townsend, 190 U. S., 267.

United States vs. Michigan, 190 U. S., 379 at 398.

Baltimore Company vs. Baltimore, 195 U. S., 375 at 382.

Northern Pacific vs Ely, 25 Wash., 384; 65 Pac., 555.

Northern Pacific vs. Ely, 197 U. S., 5.

Northern Pacific vs. Hasse, 197 U. S., 9.
Union Pacific vs. Kindred, 168 Fed., 652.

Third. But petitioners assert that the Acts of Congress are to be taken strictly against the grantee, and that the Circuit Court of Appeals gave to them a too liberal construction. If so, this court was guilty of the same error in its previous decisions upon the same point and to the same effect, which have been noted above. But the principle relied upon by petitioners is not applicable to the Acts of Congress here under discussion. It is to be remembered that these statutes are not merely grants or contracts, but laws of the United States. They are, therefore, to be construed liberally, for the purpose of carrying out the intent of Congress when ascertained, rather than strictly, against the grantee and in favor of the grantor, as might be true ordinarily in case of a public grant.

St. Paul, etc., R. R. Co. vs. Greenhalgh, 26 Fed., 563.

Winona & St. Peter R. R. Co. vs. Barney, 113 U. S., 618 at 625.

United States vs. D. & R. G., 150 U. S., 1 at 14.

M. K. & T. Ry. Co. vs. Kansas Pac. Ry. Co., 97 U. S., 491 at 497.

United States vs. Southern Pacific, 146 U. S., 570, 593, 594, 598.

As to what was the intent of Congress in making such liberal grants to the predecessors in title of the respondent, including the grant of right of way, it is

proper to inquire what were the conditions existing at the time, and what was the aim and purpose of Congress in enacting the statutes. These have been fully expressed by this court.

United States vs. Union Pacific R. R. Co., 91 U. S., 72, at 79.

United States vs. Union Pacific R. R. Co., 160 U. S., 1, 19, 20, 21, 26, 27, 28.

Fourth. It is contended by petitioners that the act of 1864 gave to the Railroad Company a mere option, at its election, to extend its line west of the 100th meridian; that it did not accept this option; but, on the contrary, elected to build its line along the course authorized by the act of 1862. It appears that subsequent to the passage of the act of 1864, and prior to that of 1866, a second map of general route was filed by the Kansas line.

M. K. & T. Ry. Co. vs. Kansas Pac. Ry. Co., 97 U. S., 491, 494.

But it also appears from the same case that this map was never accepted or approved by the officers of the United States, and was therefore ineffective for any purpose. There is nothing in the present record regarding this matter.

But the act of 1866 did no more than to specify a new date, to wit: December 1, 1866, prior to which the map of general route authorized by the act of 1864 was to be filed. And when said map was filed, though subsequent to the act of 1866, it was based upon and related to the act of 1864.

In this connection it is asserted by petitioners that it was incumbent upon the respondent to make

definite proof concerning the filing of its maps and other like matters. This court has distinctly held otherwise. Nothing need be shown except the construction of the road within the time required by the acts of Congress and the acceptance thereof by the president. The filing of maps had reference solely to the grant of odd-numbered sections, not to the grant of right of way. When the road was constructed the right of way granted was thereby identified, but the grant was effective from the date of the act.

Central Pacific vs. Dyer, 1 Saw., 641; Fed. Cases, 2552.

Northern Pacific vs. Smith, 171 U.S., 260, 267, 270.

Railroad Company vs. Baldwin, 103 U. S., 426.

Jamestown Company vs. Jones, 177 U. S., 125.

If maps had been required, the failure to file them would have been breach of a condition subsequent, for the grants made by the acts of Congress were *in praesenti* and took effect at once. A failure on the part of the grantee to fulfill any such requirement could not be taken advantage of by a private individual, but only by the United States.

Schulenberg vs. Harriman, 21 Wall., 44 at 62.

Van Wyck vs. Knevals, 106 U. S., 360.

Railroad Company vs. McGee, 115 U. S., 469.

Bybee vs. Oregon, etc., R. R. Co., 26 Fed. 586 at 588.

Same case, 139 U. S., 663, 673, 674, 679, 680, 681.

Railroad Company vs. Mingus, 165 U. S., 413, 431.

United States vs. Northern Pacific, 177 U. S., 435.

Fifth. Petitioners assert that the line west of the 100th meridian was not sufficiently defined by the act of 1864, in that it had but one terminal, whereas the western terminal was, within certain fixed limits, left to the discretion of the grantee. A similar or greater uncertainty in reference to the line of railroad was characteristic of all the Pacific railroad acts. See the act in reference to

Main line Union Pacific (12 Statutes, 489, section 8).

Central Pacific (12 Statutes, 489, section 9).

Hannibal and St. Joseph (12 Statutes, 489, section 13).

The other branch lines authorized by the act of 1862 (12 Statutes, 489, section 14).

The Sioux City Branch (13 Statutes, 356, section 17).

The Northern Pacific (13 Statutes, 365, section 1).

All of these statutes have been upheld and administered as properly describing the lines of railroad and the grants of right of way and odd-numbered sections relating thereto. This uncertainty is recog-

nized as inherent in the acts, and its propriety affirmed in a number of decisions by this court. The leading case is:

Railroad Company vs. Baldwin, 103 U. S., 426.

Sixth. Petitioners aver that unless they can invoke the writ of *certiorari*, they are left remediless. By this they mean that the case at bar is one of which the Circuit Court of Appeals is given final jurisdiction under the acts of Congress; therefore they have no right of appeal to this court. But if this be a reason for granting the writ of *certiorari*, the same reason would obtain in every case over which the Circuit Court of Appeals is given final jurisdiction. If that were true, then this court should issue the writ in every case wherein the defeated suitor had not the right of appeal to this court. To allow such a reason to prevail would defeat the purpose of the act of Congress establishing the Court of Appeals, and would produce again the very evils which that act was intended to correct and prevent.

The petitioners have had the deliberate, careful and conscientious judgment of two learned courts. Those judgments were against their contentions. How can it be said that they are remediless when they have had the benefit of every remedy which the law affords?

Seventh: Petitioners aver that unless the writ of *certiorari* be granted in this case they are without adequate remedy, because they have no right to appeal the cause to this court, although they might have had if the federal question involved had been pleaded in the bill of complaint. The cases are numerous in which jurisdiction has been denied, both by this court

and by other federal courts, because of the fact that the federal question was not set forth with sufficient fullness in the initial pleading. So far as we are aware, it has never before been asserted that, because of such rulings, due procees of law had been denied or adequate relief refused, or parties otherwise rendered remediless. It would be a strange anomaly indeed if the fact that the statutes deny jurisdiction on appeal should be considered a sufficient reason for issuing the writ of *certiorari*.

We assume that a copy of the opinion of the Circuit Court of Appeals is attached to the record which has been certified to the Supreme Court; that opinion is reported in 178 Fed., 753. The clear, cogent and conclusive reasoning of the Circuit Court of Appeals must convince that its decision in this case is in accord with settled principles of law, follows the previous decisions of this court, and ought not to be disturbed. No argument which counsel could make would add in the slightest degree to the compelling logic of that opinion.

With proper deference, but with great confidence, we assert that no case has been presented requiring, authorizing or justifying the issuance of the writ, and we, therefore, ask that the petition be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 694

THOMAS B. STUART and CHARLES A. MURRAY,
Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

SUPPLEMENTARY BRIEF AND ARGUMENT OF PETITIONERS.

We herewith submit a short supplement to our brief and argument heretofore filed, some of it embracing matters occurring recently. As no brief has been filed by respondent (so far as we are advised) since the writ of certiorari was granted, we trust that no objection can be made to our amending at this time.

I.

THE COLORADO STATUTES INVOLVED.

In our opening brief, at page 38 *et seq.*, and again at page 78, we referred to the effect of our long continued payment of taxes upon the lands under the Colorado statutes, but we omitted to set forth the statutes themselves. The sections directly involved in the controversy are as follows:

1. "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

Code of Civil Procedure, Sec. 255.

2. "If the defendant in such action *disclaim* in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs."
Code, Sec. 256.

(*Note*: In Colo. Central R. Co. vs. Smith, 5 Colo., 160, the defendant attempted to prove that it was not in possession of a *part* of the premises, but the Supreme Court said:

"So long as the defendant claimed title to the whole premises, *disclaiming as to no part thereof*, it was immaterial that it was in actual possession of only a part.")

3. "That every person in the peaceable and undisputed possession of lands or tenements, including mining claims, under claim and color of title, made in good faith,

including preemptions * * * * who shall for five successive years (amended to seven years in 1893), hereafter continue in possession, and shall also, during said time, pay all taxes legally assessed on said lands, tenements or mining claims, shall be held *and adjudged to be the legal owner of said land* * * to the extent and according to the purport of his or her proper (paper) title or preemption. All persons holding under such possession by purchase, devise or descent, before said five years shall have expired, and who shall continue said possession, and continue to pay the taxes aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

II. Mills Statutes, Sec. 2923.

4. "Whenever any person having color of title, either by preemption or otherwise, as aforesaid, made in good faith, *to vacant and unoccupied land* or mining claims, shall pay all taxes legally assessed thereon * * * * for five successive years (changed to seven years in 1893), he or she shall be deemed *and adjudged to be the legal owner of said vacant and unoccupied lands or mining claims*, to the extent and according to the purport of his or her proper (paper) title or preemption. All persons holding under such tax payer * * * who shall continue to pay the taxes as aforesaid, so as to complete the payment of the taxes for the term aforesaid, shall be entitled to the benefit of the section."

II. Mills Statutes, Sec. 2924.

5. "In all cases *at law or in equity* brought to recover the possession of any lands, tenements or mining claims, except in actions of ejectment, *the party defendant* may plead such possession, payment of taxes as aforesaid in bar of such action, and *on failure to plead* such possession and payment of taxes, the right of the said defendant to avail himself of the benefit of said statute shall be *waived* by the said defendant."

II. Mills Statutes, Sec. 2926.

6. All conveyances of real estate and of any interest therein shall be held to carry with them the right to immediate possession of the premises * * * unless a future date for the possession is therein specified."

I. Mills Statutes, Sec. 435.

Upon the question of the payment of taxes in this case, it is said in the opinion of the Court of Appeals:

"As to the payment of taxes, about which opposing counsel seem to differ, we think the evidence shows that the entire tract was assessed to the appellants, without any deduction of a right of way; that a 400-foot strip across the tract was included in the entire railroad right of way assessed to the appellee; and that taxes based upon such assessments were paid in due course by the appellants and the appellee respectively, no notice being taken of the double taxation involved therein. And this being so, neither party can derive any special ad-

vantage from the payment of taxes." (178 Fed., p. 755).

This conclusion of the Court of Appeals we believe to be erroneous in vital particulars.

1. The Colorado statute we have quoted (II. Mills, Sec. 2926) expressly requires that the defendant in such cases must *plead* the requisite payment of taxes, otherwise all claim to benefit on account of such payment shall be regarded as *waived*. There is nothing whatever in the answer of respondent in this case referring to the payment of taxes by it,—not a word. The plaintiffs in their petition plead payment of taxes for seven years, but there is no such claim in the answer of the railroad company. In the absence of an express statute, the general rules of pleading would require the company to set up its defenses by its answer, otherwise it would not be permitted to prove them. But the statute leaves no doubt of this. Our contention, therefore, is that any claim of payment of taxes by the respondent company is a matter not properly before the Court of Appeals, and not in the record.

2. THERE IS NOT A WORD OF COMPETENT EVIDENCE THAT RESPONDENT PAID ANY TAXES ON THE LAND.

All the proof offered by the defendant on this subject is found in the testimony of one Arthur W. Scribner, who styled himself its tax commissioner, residing in Omaha. His testimony appears on pages 122 to 128 of the printed transcript, and is as choice a collection of hearsay and non-expert conclusions as can readily be found. Thus he says, over objections, with reference to the alleged assessments of

this particular right of way by the Colorado State Board of Equalization (p. 123):

> "A. From the year 1891 to the year 1901, inclusive, returns were made of the railroad mileage of main line from Denver east to the Kansas line. Commencing with 1902, for greater certainty, we have included in our returns to the State Board the acreage of the right of way in each county crossed by the line of railroad referred to * * *. Q. "Since 1902 you say that you have stated in your returns the acreage in each county crossed by said line of railroad? A. Yes, sir. * * * Q. State whether or not in computing that acreage and returning it to the State Board of Equalization you have included for a right of way through section 20, township 3 South, range 67 West, a strip of land 400 feet in width, being 200 feet on each side of the center of main track? (Objected to). A. Yes, sir; I know that has been included to the extent of 400 feet in width at that point and in that section."

In his cross examination, on page 127, he explains how he "knows" all this:

> "Q. When you say you have given in the acreage of the right of way in recent assessments, do you mean to say that you have given in that acreage from personal knowledge or from reports that you have received? A. *My inspection of and reports compiled from the right of way recorded in the office of the chief engineer.*"

(*Note*: We find we were in error in our previous brief in stating, on page 78 thereof, that the Colo-

rado statute providing for such returns to the board of equalization was not passed until 1902, as such a provision was in force as early as 1877. We inadvertently applied the date given by the witness when the company began to return the *acreage* of its claimed right of way.)

Here is hearsay piled on hearsay. In the first place, there is no law making either the records, or compilations from the records, of the company's chief engineer evidence in our courts. The records and not the compilations would be the best evidence, even if such records could be evidence in the company's favor. But, in the next place, we have nothing here but the hearsay and secondary conclusions of the witness upon what is said to be contained in the hearsay and secondary compilations of certain incompetent private records of the company.

No part of this evidence has any value. It was all objected to. If any returns were made to the State Board, and any assessments were made by that body thereon, the original records, or at least certified copies thereof, should have been produced. The statements of this witness are incompetent conclusions upon incompetent and irrelevant compilations from incompetent records of the company's engineer, and are therefore removed three degrees from competency. Any fact, no matter how false, could be made to pass as the truth, without any of the perils of perjury, by this Scribner process.

This whole matter is determined by the Colorado statutes. They fully provide for *official, record* evidence of the assessment of railway property

by the State Board of Equalization. Section 3807, II Mill's Statutes, contains the provision which has been in force for about thirty-five years, and is still in force, and is, omitting immaterial portions, as follows:

> "On the first day of April in each year the State Board of Equalization shall meet at the executive office, and they shall meet from day to day thereafter until the business of said board, as hereinafter provided, shall be accomplished. The duties of said board shall be to assess all the property in this state belonging to railway corporations, except lots and parcels of real estate owned by the road within each county, and improvements thereon, and except depots, machine shops, and other improved property connected with such road and located in any county, which shall be taxed in the county where situate. The president, vice president, general superintendent, auditor or other general officer of any corporation operating any railway in the state, shall furnish said board, on or before the 15th day of March in each year, a statement signed and sworn to by one of such officers, showing in detail for the year ending on the 31st day of December preceding:—first, the whole number of miles owned, operated or leased in the state by such corporation making the return, and the value thereof per mile with a detailed statement of all property of every kind and the value of same, located in each county in the state. * * * "

> "The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this

state, and shall include the right of way, road-bed, bridges, culverts. * * *"

"On or before the 15th day of April in each year, said board shall transmit to the county clerk of each county through which any railway may run, a statement showing the length of the main track of each railway within the county, and the assessed value of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole property herein specified. Said statement shall be entered on the proper record of the county. * * * All such railway property shall be taxable upon said assessment by the same officers and for the same purposes as the property of individuals within such counties and municipal corporations."

The statute provides for two official documents which, of course, become public records: first, the sworn return of the railroad company, signed by one of its designated officers; second, the statement or certificate of the board to the county clerk of the county to be entered in the county records.

This claim of the respondent that it had paid the taxes was, if a defense at all, an *affirmative defense.* The burden was on it to establish such assessment and payment by a preponderance of *competent* proof. It could not do this by the verbal conclusions of its tax-commissioner, a functionary unknown to the statute, based upon what he claimed to have read in the office of its chief engineer. All this proof offered by the company at the trial should have been entirely ruled out on our objections, instead of becoming the basis of the opinion of the Court of Appeals.

On the other hand, the plaintiffs in their petition alleged that "since the 2d day of January, 1867, down to the present time, through their grantors and by themselves, they have held and been in possession of said lands, and have exercised all rights of ownership thereon, and have paid all taxes levied upon said lands and all parts thereof." (Record, p. 3, folio 4). At the trial, plaintiffs proved by tax vouchers, court records and other perfectly competent testimony, their possession, and the payment of all the taxes on the entire 160 acres, from the issue of patent to the time of trial, aggregating $50 or $60 for each acre, and amounting to $1,000 to $1,200, beside interest, for the 400-foot strip in controversy.

We submit that the Court of Appeals grievously erred in dismissing this vital feature of this case by concluding *from the evidence* that the taxes were assessed to, and paid by, *both* parties, and that "this being so, neither party can derive any special advantage from the payment of taxes."

It seems clear on this record that, even if it could be conceived that the respondent ever acquired any right of way across the lands in question, it cannot now assert it, in the face of the Colorado statutes and of plaintiffs' proof of possession and payment of taxes thereunder. That the right of way of The Union Pacific Railroad Company has at all times been subject to state taxation was settled by this court years ago.

Thompson vs. Union Pacific R. R. Co., 9 Wall., 579;

Union Pacific R. R. Co. vs. Peniston, 18 Wall., 5.

In the case last named, this court said:

> "In this case the tax is laid upon the property of the railroad company, precisely as was the tax complained of in Thompson vs. R. R. Co. It is not imposed upon the franchises or right of the company to exist or perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do * * * *. It is impossible to maintain that this is any interference with the exercise of any power belonging to the general government, and, if it is not, it is prohibited by no constitutional implications."

Nor can the railroad company in this case take refuge behind the decisions in what are called the Northern Pacific cases, 171 U. S., 260, 190 U. S., 267 and 197 U. S., 1. By those decisions this court held that adverse possession under statutes of limitation would not protect holders of land granted by acts of congress for railroad rights of way, when the same had been afterward *voluntarily* alienated. Nothing in them contradicts Thompson vs. U. P. R. Co. and U. P. R. Co. vs. Peniston, *supra*. Indeed, in Northern P. R. Co. vs. Ely, 197 U. S., 1, quoting from the Townsend case, this court said:

> "Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to alienate, *voluntarily*, the right of way, or any portion thereof."

And in another place, again speaking of the Townsend decision, the court said:

> "At the same time, it was not denied that such right of way granted through the public domain within a state was amenable to the police power of the state."

It is fundamental that the enforcement of the collection of its revenue is one of the conspicuous attributes of sovereignty, and is within the police power of the state.

There can be no question that this right of way was subject to taxation. This is conceded by the company, as shown by its efforts to prove (without pleading it) the assessment and its payment of taxes upon it through the State Board of Equalization. If the strip of land was subject to taxation, then the collection of such taxes must have been enforced by statutes of general application, and therefore it became subject to loss for non-payment by the seven-year statute aforesaid, precisely as all real property in Colorado was subject to that statute.

> "All such railway property shall be taxable upon said assessment by the same officers and for the same purposes as the property of individuals within such counties and municipalities."

Colorado Statutes, II Mills, Sec. 3807.

Another Point to be Noted in this connection is that, although the law since 1877 required respondent to make its returns to the state board, it does not claim that it ever attempted to do so until 1891, and then for ten years, according to Scribner's testimony, it returned no *acreage* in any county, but

only the *general mileage* from Denver to Kansas. So that from '77 to '91, *two seven-year periods*, the owners of this land paid all the taxes thereon without any record notice that the company claimed to own an acre of the right of way and thereafter they so continued to pay until this action was begun (in 1906) *fifteen years more*. The statute of Colorado therefore gave them title at least four times over.

II.

THE ACT OF JUNE 24, 1912.

In this connection, the recent Act of Congress (H. R. 16689) entitled, "An Act Legalizing certain conveyances heretofore made by The Union Pacific Railroad Company," approved June 24, 1912, since our first brief was filed, is important. It is short, and for greater convenience, we set it forth in full:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all conveyances or agreements heretofore made by the Union Pacific Railroad Company or the Union Pacific Railway Company, or Union Pacific Railroad Company, or the Leavenworth, Pawnee and Western Railroad Company, or the Union Pacific Railway Company, Eastern Division, or the Kansas Pacific Railway Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way of the Union Pacific Railroad Company granted by the Government by the Act of Congress of July first, eighteen hundred and sixty-two, entitled, 'An Act to aid the construction of a railroad and telegraph line from the Missouri

River to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes'; and also all conveyances or agreements heretofore made by the Union Pacific Railroad Company, or the Union Pacific Railway Company, or the Denver Pacific Railway and Telegraph Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way between Denver, Colorado, and Cheyenne, Wyoming, of any of said companies granted by or held under any Act of Congress, and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee-simple title.

"That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation, or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way.

"Sec. 2. That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject,

abandoned as a right of way is hereby granted to the owner of the land abutting thereon.

"Sec. 3. That nothing hereinbefore contained shall have the effect to diminish said right of way to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained: *Provided*, That nothing herein contained shall be taken or construed to be a recognition of any right in the Union Pacific Railway Company as successor in interest to the Union Pacific Railroad Company."

We have all the time denied, and we still urge, that NEITHER THE RESPONDENT, NOR ANY OF ITS PREDECESSORS IN INTEREST, EVER ACQUIRED, BY ANY ACT OF CONGRESS, ANY RIGHT OF WAY WHATEVER THROUGH THE LAND INVOLVED IN THIS CASE. If our claim is correct, then, of course, there can be no further controversy.

But respondent contends, and the Court of Appeals seems to have sustained its contention, that it did acquire such right of way by the Act of 1862, "as amended by the Act of 1864," or by reading the Act of 1864, or section 9 thereof, into the Act of 1862. Certainly no sane person would claim that any such right of way was granted by the Act of 1864 *alone*. It is only by carrying back the language of that Act and tacking it upon the grant contained in the previous act, that any pretense of support for respondent's claim can be found. If this right of way did not originate in the grant of the Act of 1862, it has within the provision of the Act of 1912, and especially no existence. If it exists at all, it therefore comes within the provision we have quoted and italicized,

and is subject to the adverse possession and limitation we have pleaded and proved under the aforesaid seven-year statute of Colorado—at least as to three-fourths of the 400 feet claimed.

III.

ADDITIONAL EXTRACTS FROM THE CONGRESSIONAL RECORD.

In our first brief (pages 51 to 54) we quoted a small portion of the debate in the senate in June, 1866, on Senate Bill 317, to amend the Union Pacific Act. The views of the eminent lawyers who took part in that discussion throw so much light upon the acts of 1862 and 1864, that we beg leave to quote more fully.

It appears that Senator Howard, chairman of the committee to whom the bill had been referred, called it up for consideration (Globe, p. 3181), when the following occurred (italics ours):

> "Mr. Kirkwood: But the first clause of the section says that the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, without reference to the 100th meridian of longitude, may continue their road westward acording to the best and most practicable route. What does this language mean?
>
> Mr. Ramsay: They are now *required to meet the main line at the one hundreth meridian.. This* is to allow them *to go to Denver.*
>
> Mr. Howard: They are bound by the provisions of the law, of course, and they are required to meet and connect with and

connect with the main line and form a continuous line. *There is no uncertainty about it.*"

(Note: It seems that respondent's present idea that the act of 1864 permitted each and all of the branches to build continuous lines westward from the 100th meridian had not dawned upon the chairman of the committee.)

June 18, 1866 (p. 3224), Senator Pomeroy offered an amendment which would authorize the Hannibal and St. Joseph road to build to the meridian, instead of the Union Pacific Eastern Division, whereupon Senator Sherman suggested that such amendment would defeat the bill in the House, and the discussion proceeded:

"Mr. Pomeroy: The senator may not be aware that the Republican Valley is mostly in Nebraska.

Mr. Sherman: I know that, but this bill authorizes the road to be extended westward from Fort Riley, in the state of Kansas. If they should follow *the existing law*, they would soon pass out of the state of Kansas, *and finish their road in the Territory of Nebraska.*"

(Note: The distinguished senator from Ohio also seemed to be of the opinion that the Act of 1864 fixed the point of connection at the 100th meridian.)

"June 19th (p. 3253):

"Mr. Pomeroy: I did not suppose that this amendment would endanger the bill.

* * * * * * * * *

"The bill now proposes to *change the*

location of the road. The point I am objecting to is that when that is done, justice ought to be done to the parties who have taken it for granted, under the provisions of the bill, *that the road was to be located in the valley of the Republican.*

"Mr. Conness: The provision of the law *now* is that the Pacific Railroad, Eastern Division, *shall be located through the valley of the Republican River,* and the Senator from Kansas says that because of that provision many persons have bought the even sections of land of the government, and paid the enhanced price of $2.50 per acre for them, and if this bill shall pass authorizing the company to vary the route, *to change the location* to the valley of the Smoky Hill River, those settlers ought to be compensated by the government, and not required to pay $2.50 per acre for their land."

This practically brings the discussion down to the point from which we began to quote in our previous brief, where Senator Kirkwood said (p. 3264):

"It seems to me we are acting somewhat blindly in this matter and *undoing what has been very carefully done heretofore.* The idea of the Pacific Road, as I understand it, *was to make one trunk line from the 100th meridian west,* and *three branches uniting at, or about, that point with the main trunk, etc.*"

Following the point at which we ceased to quote in our former brief, the record shows that Senator Kirkwood finally summed up the matter as follows:

"Mr. Kirkwood: But that does not ap-

pear to be all. It seems that the Secretary of the Interior holds that, under the law of 1864, the right of going up the Smoky Hill route is not accorded to them, and they yet must go up the Republican River route; that the *only benefit* derived by them from the legislation of 1864 is that they are not compelled to unite with the main stem *precisely at the one hundredth meridian, but near to it, and still between the valley of the Platte and the valley of the Republican.* If that is correct, the question before us under the present bill is whether we shall *really change the whole plan laid down when the Pacific railroad was first established.* If it be now so that under the law the Eastern Division cannot go up the Smoky Hill route but is compelled to follow up the valley of the Republican and must meet the main stem *near* the one hundreth meridian, then this bill asks us to abandon all that and establish a new policy. If that be the condition of affairs, I cannot vote for the first section of the bill."

To the disinterested reader it must seem plain from this debate that, as late as June, 1866, the lawyers in the senate were practically agreed that the act of 1864 was never intended to change the policy of Congress, as expressed by the grant of 1862, to have *one* through trunk line, with a branch, or branches, joining it at the 100th meridian. Apparently no one, not even the closest friends of the railroad, then claimed that it was intended by the act of 1864 to overturn that policy and to permit the branch lines, each for itself, to build a separate trunk line from that meridian westwardly to any point east of the Western boundary of Nevada. It seems to have

been thoroughly understood in the senate that if the act of 1864 contained any authority to build west of the 100th meridian, still the connection with the main line must be made and kept at some point between the "south margin of the valley of the Republican River and the north margin of the valley of the Platte River, IN THE TERRITORY OF NEBRASKA," as was expressly stated in the act of 1862.

From the discussion in the senate, it appears that, in addition to the views so expressed by the lawyers in that body, the Secretary of the Interior, Hon. James Harlan, himself a legal authority, had held that the terms of the act of 1864 required the Union Pacific, Eastern Division, to connect at the 100th meridian, and also that the Attorney General had held that no maps could be filed under the act of 1864, later than July 1, 1865, for any other route. Certainly, the views of these officials, whose peculiar duty it was to construe and administer these railroad grants, are wholly at variance with the present claims of the respondent in this case.

IV.

THE WORDS "ON THE SAME LINE," IN THE ACT OF 1864.

The meaning of the act of 1864 as thus accepted by the Senate is further revealed by the language of section 12 of that act, which does not appear to have been specifically mentioned in the debate. We have already, in our first brief, quoted section 12 in full. After providing that the Union Pacific, Eastern Division, should build, either from the mouth of the Kansas River via Leavenworth, or from Leavenworth to Lawrence, etc., the section continues:

"And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad (main line) through the territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific, Eastern Division, shall have completed their road *to the 100th degree of longitude*, then the last named company may proceed to make said road (main line) westward until it meets and connects with the Central Pacific Railroad Company ON THE SAME LINE. * * * *Provided*, that no bonds shall be issued or land certified by the United States to any person or company for the construction of any part of the *main trunk line* of said railroad (Union Pacific) *west of the 100th meridian* of longitude and east of the Rocky Mountains, until said road (main line) shall be completed from Omaha, on the Missouri River, to the 100th meridian."

What did Congress mean by providing that, in certain contingencies, the Union Pacific, Eastern Division, might build west from the 100th meridian "on the same line," if it did not mean that, if it should so build, it must adopt and adhere to the right of way already granted for the main line by the act of 1862?

Under the familiar rule of the construction of legislative enactments, it must be presumed that the words, "on the same line," were inserted for a purpose and not idly. By them, in connection with the other language used, it seems very clear that the only provision made for any right of way for respondent's predecessor in interest, west of the 100th meridian, was that it should follow the line marked

out by the act of 1862, that is, that it should begin at a point on that meridian *in Nebraska*, and between the margins of the Platte and Republican River Valleys, and should run thence westerly "upon the *most direct*, central, and practicable route" to the boundary line of Nevada. A glance at the map shows that the "most direct" road betwen the initial point indicated in Nebraska and the boundary line of Nevada, would run at least 100 miles north of Denver, and at least 100 miles distant from the lands involved in this suit, and that the most practicable route was far north of Denver is settled by the fact that the main line was actually built directly west from that initial point through Cheyenne, which is more than 100 miles north of Denver.

But the learned writer of the opinion of the Court of Appeals says that this language in section 12 gives rise to a mere "implication," which is "more than dispelled when the provision is contrasted with the clear and specific language of section 9." In this way, that court reaches the result that, notwithstanding its coincident conclusion that section 9 itself gave a mere option (which the company never acted upon, as we have seen), the words in section 9," such company shall be entitled to all the *benefits* * * * of *this act*" (*i. e.*, the act of 1864, which does not contain a word about a right of way over public lands) gave the Union Pacific Company, Eastern Division, an entirely new right of way, 400 feet wide and of indefinite length, up to 1,500 miles, having an entirely new initial point, *in Kansas*, and running 100 miles south of the right of way "on the same line" expressly designated in section 12. And

this result is reached notwithstanding the further fact that section 9 bestowed said "benefits," not on the Union Pacific, Eastern Division, at all, but upon the Sioux City Road, and the Burlington and Missouri road, which were the only roads expressly "authorized by *this act*" to build so as to become entitled to said benefits.

V.

THE CASES CITED BY RESPONDENT.

In their brief opposing the petition for the writ of certiorari, counsel for respondent cite the cases upon which they most relied in the lower courts to sustain their claim of a right-of-way. Those cases are cited also by the learned writer of the opinion of the Court of Appeals in support of his conclusions. Some of them, as, for instance, *Railroad Co. vs. Baldwin*, 103 U. S., 426, *M. K. & T. Ry. Co.* vs. *K. P. R. Co.*, 97 U. S., 491, and *Smith vs. Northern Pacific R. R.*, 58 Fed., 513, we discussed in our previous brief, and we need not extend this argument by further reference to them. We respectfully submit that none of these citations sustain respondent's claim, or justify the conclusion of the Court of Appeals. Let us briefly examine them, one by one.

Beginning with *United States vs. K. P. R. R. Co.*, 99 U. S., 455, we find that it does not involve any question of a right of way, as that matter was not under consideration. It merely recognizes authority in the company to extend its road west of the 100th meridian, which would mean the right to *condemn* ground for the right of way, but it also says that "it was entirely in its option." As the company never

exercised this option, but let it lapse, and filed its first maps under a later act, and after our rights had their inception, this opinion can hardly be regarded as establishing the grant of a right-of-way over the lands in dispute here, especially since all such grants must be positively expressed in the statute, and, if not expressed, cannot be implied. (See our first brief, pp. 25 and 26). Certainly the language of that opinion, written without any apparent reference to any right of way, should have little or no weight on the question here. Yet it is the authority most quoted and relied upon by the author of the opinion below (178 Fed., p. 760), and of which he says, "What was thus said seems to be decisive of the question." It seems to us that the parent error of the Court of Appeals is its misconstruing mere "authority to build" into *a complete grant of a right of way*. And it does this even after stating the matter correctly upon page 756 of the opinion, where it says:

> "If it be not true that the Pacific Railroad acts granted a right of way, 400 feet in width across the Eastman tract, it is still true that *they authorized the acquisition* BY AGREEMENT OR CONDEMNATION *of a right of way thereover, not exceeding 200 feet in width.*"

The next case, *Bybee vs. Oregon & Co. R. Co.*, 26 Fed., 586, 139 U. S., 663, is readily distinguishable from that at bar. The distinction is disclosed in the following language, appearing in the opinion of the court:

> "The only title which the plaintiff seems to have had to the land in question

was by virtue of an appropriation or occupation under the act of Juy 26, 1866, 'granting the right of way to ditch and canal owaers over the public lands and for other purposes.' 14 St., 251. But as his occupation dates only from May, 1879, *long after the defendant company had become entitled to its right of way* over these lands by virtue of the act of July 25, 1866, his claim was clearly subordinate to that of the railroad company. Under this act, the plaintiff acquired no right to any portion of the public lands until his *actual taking possesion of the same* for the purpose of constructing a ditch."

In the Bybee case, the plaintiff (1) claimed under a statute one day later than that granting the railroad company its right of way; (2) his rights dated from his actual occupancy, which was nearly 13 years after the initiation of the right of way of the railroad company; and (3) that act (14 statutes, p. 239, sec. 2), fixed no limit within which the map should be filed, as did the Union Pacific act, but provided merely that, upon filing such map, the Secretary of the Interior should withdraw the lands from sale, etc.

We find nothing in the case of *M. K. & T. Ry. Co. vs. Cook*, 163 U. S., 491, cited in the opinion of the court below, in support of respondent's contention. It seems to us to be directly contrary thereto. The substance of that decision is that, although the grant of the subsidy lands and the grant of the right of way are both in praesenti, yet the filing of the map of the line surveyed, in compliance with the statute, definitely, fixed the location of the road, so that the

rights of the settler, acquired after the line was so fixed, could not be affected by a subsequent change of the line and the building of the road thereon across his land. Now apply that decision to the facts of this case:

1. The respondent, under that act of 1864, filed its map locating and extending its route up the Republican River, *stopping at the 100th meridian.* (These matters are shown in the history of the road set forth in *Mo., etc., Ry. Co. vs. K. P. Ry. Co.*, 97 U. S., 491).

2. While the matter was in this situation, Eastman, on the 16th day of June, 1866, filed on the land, and followed the filing to final entry and patent, October 1, 1867. This is expressly admitted by respondent's answer (Record, p. 27), and is found by the Court of Appeals in its statement of the facts (178 Fed., p. 754).

3. *Sixteen days after the initiation of Eastman's rights,* the act of 1866 took effect (July 3). Claiming under that act, a few days later (July 11) the company filed its map, which was approved, fixing its general line from Ft. Riley westward *to the western boundary of Kansas, and no further,* thus stopping at a point at least 150 miles from Eastman's land.

4. Next came the act of July 3, 1866, which extended and limited the time for filing any map to December 1, 1866. But no further map was filed, and the only one ever filed extended only to the western line of Kansas.

Now, by what process of deduction can respond-

ent derive any support from the Cook case for its claim to a right of way over the Eastman land?

Northern Pacific R. R. Co. vs. Smith, 171 U. S., 260, is also cited in the opinion below and in respondent's brief filed here. The facts and the law of that case are accurately condensed in the first paragraph of the syllabus thereto, thus (italics ours):

> "A land company entered into possession of a tract of land as a town-site, but filed no plat for about two years. *In the meantime*, a railroad company *constructed its line across the tract*, and claimed title to a strip 400 feet wide as a right of way, under the act of congress incorporating it. Several years after, the tract was granted to the mayor in behalf of the city, as a town-site.
>
> *Held*, that the title of a grantee of the city could not be *carried back* so to defeat the title of the railway company."

In that case, although the railroad company had abandoned the line fixed by its map of definite location, and had built its road nearly a mile further south, still its *actual occupation* prevailed as against Smith's *after acquired title*.

We have never doubted that actual construction of such road would do away with the necessity of filing location maps. If the Union Pacific, Eastern Division, even after failing to file any maps over the Eastman lands, as required by the acts under which it is claiming, had, nevertheless, gone on and laid its track across said land, prior to June 16, 1866, from which time Eastman's title dates, it might have claimed shelter under the foregoing decision, pro-

vided the act granted it the right of way. But here, as we have seen, Eastman's perfectly valid title was initiated about four years before the road was built on his land, and when there was not a map on file, or any other indication that the road was to come within a hundred and fifty miles of it.

Northern Pacific Ry. Co. vs. Hasse, 197 U. S., 9, simply follows *Northern Pacific Ry. Co. vs. Townsend*, 190 U. S., 267, as does *Northern Pacific Ry. Co. vs. Ely*, 197 U. S., 1, and the Townsend case is authority only for the proposition that, when "the grant of the right of way, *the filing of the map of definite location*, and *the construction of the railroad* within the quarter section in question *preceded* the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands," and, further, that the homesteaders could acquire no title by subsequent adverse possession under the state statutes, although the interest of the company was still subject to the police power of the state.

There is nothing in these Northern Pacific cases to aid the respondent in the claim at bar.

Kindred vs. Union Pacific R. R. Co., 168 Fed., 652, another case cited both in the opinion and in the brief, is on the same line with the Northern Pacific decisions to the effect that the congressional grant of a right of way cannot be lost by voluntary alienation or laches, and this we admit. As that case involved the right of way in the extreme eastern end of Kansas, given by the original U. P. grant of 1862, it could in any event have no bearing here.

We have not attempted to review all the cases mentioned in respondent's brief on file. But we believe we have called attention to all those cited in the opinion of the lower court, and to all those upon which respondent really relies.

We here invite special attention to *Werling vs. Ingersoll*, 181 U. S., 131, 21 Reporter, 570, not cited in our first brief. It emphasizes the absolute necessity of the filing of maps under congresional land grants, although the grant be *in praesenti*.

In that case, it appears that, by an act of congress in 1822, the state of Illinois was authorized to construct a canal through the public lands, and a right-of-way 180 feet in width, 90 feet on each side, was reserved for the purpose, provided the state should file in the Treasury Department a complete map thereof within three years. In 1827, in aid of said canal, congress granted to the state alternate sections on each side of the canal, reserving the remaining alternate sections to the government. Meantime, in 1823 and 1824, a route for the canal through the public lands was surveyed and marked, but no map thereof was filed. In 1829, however, under the act of 1827, a map was filed. We have given a mere outline of the facts, but enough, we hope, to show the application of the case to the one at bar.

This court held that, if the proper proceedings had been taken under the act of 1822, the route surveyed, *and map filed as required by the act*, the strip would probably have vested in the state, "as of the date of such act;" but that, in the absence of the adoption of such route and the filing of a map thereof, the state acquired no interest in the land in con-

troversy, which was a portion of the 90-foot strip on the south side of the canal.

In the course of the opinion, the court also held that, under the act of 1827, in the sections of land reserved "no title to or use of the 90 feet on each side of the canal is given," although it further held that a right of way through the reserved sections (public lands) would be implied from the nature and purpose of the grant, but that the implication would not extend to the 90 feet on each side, but only "to the land *necessary to be used* for the canal of the width contemplated."

At least three matters involved in this case are determined by the foregoing opinion:

First: That the congressional grant of a right-of-way *in praesenti* is unavailing unless strictly followed up by the survey and filing of required maps.

Second: That even the grant of alternate sections of land to aid in the construction of canals or railways gives no right of way across the reserved sections, even though still *public* lands, excepting, by implication, to the width necessary to be used for the purpose, and no more.

Third: By necessary inference, that neither such specific grant of right-of-way, unaccompanied by the filing of maps, nor such grant of the lands themselves, can fasten such right-of-way upon lands in the meantime removed from the public domain by private entry.

In the case at bar there is no place for the *implied* right of way suggested above, even for the 20 feet, or 50 feet, claimed to be actually and necessar-

ily used by respondent. Justice Peckham based the implication solely on the ground that it could not be presumed that the government would grant the alternate sections to aid in building the road, and then close all approach to them through the sections reserved. But in our case there is no pretense of claim that any subsidy lands were granted west of the meridian, and hence there is no ground for implying any right of way, of any width.

We submit *Werling vs. Ingersoll*, 181 U. S., 131, together with *Union Pacific vs. Harris*, 215 U. S., 386, commented on in our previous brief, as two recent decisions of this court with which the claim of respondent and the conclusions of the lower court are at variance. The same is true also of *Jamestown & Northern R. Co. vs. Jones*, 177 U. S., 125, which concerned a grant of right of way in *praesenti* by the act of 1875, and of which this court by Justice McKenna said:

> "It (the statute) enables the railroad company to secure the grant (right of way) by an actual construction of its road, or, *in advance of construction, by filing a map* as provided by in section 4."

VI.

FURTHER OF THE FILING OF MAPS.

In this connection, it is to be borne in mind that EASTMAN'S PATENT DATES BACK TO JUNE 16, 1866.

By an invariable rule, the patent relates back to the date of settlement. The authorities for this statement are uniform. We cite but one or two:

"Where a state seeks to select lands or a part of the grant to it by the eighth section of the act of Congress of Sept. 4, 1841, and a settler seeks to acquire a right of preemption to the same lands, *the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act, and cuts off all intervening claimants.*" (Syllabus.) Shepley vs. Cowan, 91 U. S., 330.

"The patent is deemed to relate back to the time of *the inception of the patentee's claim* to the land."

32 Cyc., p. 1037 and notes.

So that, even if the company had filed the required maps under the act of 1866 (which is precisely what it did not do), still its rights would have been subordinate to Eastman's.

The Court of Appeals says (p. 755) there was "some evidence indicating" that "some kind of a map showing the *general* route westward, was filed prior to November 30, 1866, and that a map showing the *definite* location of the road to Denver was filed in the Denver land office, in September, 1870. But it further says, "none of these maps, nor any better statement of what was shown thereon, was offered in evidence."

This is a concession that there is no *competent* evidence in this record of any such maps. And it has been shown conclusively, that no map of any kind was ever filed.

It is said, however (page 23 of brief opposing petition herein), that the filing of maps had refer-

ence only to the grant of the sections, and "not to the grant of right of way."

This will not do. The act requires these maps, and it is not for the defendant to determine that they were not required in reference to the right of way. Besides, it is plain to be seen that the grant of the subsidy lands depended on the map of definite location. That definite location refers exclusively to the track, or right of way. The general map spoken of was simply for the purpose of *withdrawing* lands. The lands withdrawn might or might not be embraced, when the line of definite location was established. Every reason that can be thought of requires these maps for the protection of the public. According to the respondent's theory, its road might take the better part of every city and town on its line, and, indeed, there would be this inducement to defer filing maps. If the map of the general route does not embrace the right of way at or about the center of it, then there is no basis on which to withdraw the lands. These lands must be within a certain number of miles *on each side of the track*. The location of the track in a "general" way, is the first thing to be done, and on this location rests the right to withdraw the lands from the market. Such a location is not conclusive. It must be followed by a map of "definite" location, and here again it is in reference to *the track, or right of way*. The definite location of the lands becomes fixed only by the definite location of the *track or right of way*. So we see that directly the contrary of the propostion stated by the defendant is true, and that both of these maps refer to *track or right of way* only, and that the subsidy lands follow as an incident to the locating of the track or right of way.

On page 23 it is claimed that, so far as the right of way is concerned, the grant took effect from the date of the act. This is true, *provided, always it is followed up by filing map of definite location or by actual construction.*

Jamestown & Northern Co. vs. Jones, 177 U. S., 125 *supra.*

It cannot be supposed that every 160-acre tract of land, lying in a westerly direction from Kansas City through to the western line of Nevada, had a right of way granted out of it. There was only one right of way granted the railroad company, and, in order to make it operative, certain acts were required of the company. It must apply it by surveys and maps *to particular lands.* It was necessarily a float, just like a land warrant, until it was so applied. We have admitted that the right of way might be fixed by *actual construction reported to and approved by the government.* But when such actual construction takes place, we must bear in mind that it must be on *public* land; if it is not, it is not embraced in the words of the grant. Any other construction than this would handicap the government itself, and would wrong the public to an unheard of and unbearable extent. It would be impossible for the government to give a patent that would carry a perfect title to any of its lands that might lie "westerly" from Kansas City—according to the claims of this respondent.

That the filing of the map is, in the absence of actual construction of the road upon the land, essential to fix the grant of the right of way is recognized, also in the opinion in *Union Pacific* vs. *City of*

Greeley, 189 Fed. 1, 6, although that decision of the Court of Appeals follows, naturally, its opinion in this case.

However, the separate opinion of Judge Reed in that case (pp. 17 to 25) strongly indicates that he is not entirely satisfied with the view of the Court on the question. For, among other things, he says (p.23):

> "But I am unable to believe that it was intended by these acts of Congress to give to the Kansas Company an *unlimited* right to build its road upon any line it might *thereafter* select, between the mouth of the Kansas River and the Western boundary of Nevada, *regardless of the rights of settlers or others who might acquire interests in the land before the route was selected or the required maps thereof filed with the Secretary of the Interior.*"

Respectfully submitted,

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Supreme Court of the United States

October Term 1912.

No. 135.

THOMAS B. STUART ET AL.,
Petitioners and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent and Appellee.

BRIEF OF PETITIONERS AND APPELLANTS IN REPLY.

Since the recent filing of our supplemental brief, we have received the argument on behalf of appellee. The time indicated for the oral argument is so near that we are unable to prepare an elaborate reply. We are also aware that the rules of this court do not expressly provide for reply

briefs, although they do not expressly forbid the same. However, there are certain erroneous statements, some of them statements of fact, in the brief of appellee, which, we, of course, could not anticipate, and which we do not desire to pass unquestioned. We therefore offer these corrections.

Error No. 1—The Burden of Proof.

Under his "first point," the learned counsel for appellee, in black type, says:

"It was incumbent upon appellants to show not only title, but possession in themselves. They failed in both particulars."

We are constrained to deny both of these statements. Ordinarily, the burden would rest on the plaintiffs, as stated, but in this case we contend that the answer of appellee is not sufficient to put plaintiffs on proof, either of title or of possession, *although they did in fact abundantly prove both.* Counsel is right in his citation of the Colorado Code and decisions to the effect that in such cases the defendant cannot put the plaintiff on proof by filing a mere denial. He must go further and affirmatively allege facts showing that he has an adverse interest in the property.

As was said in *Wall vs. Magnes*, 17 Colo. 476, 478,

"It is sufficient if, after pleading possession and ownership by plaintiff, the complaint avers generally that defendant claims some adverse estate or

interest, and that such claim is unfounded. *Ely vs. N. M. & A. R. R. Co., 129 U. S. 291.* It is for defendant, if he relies upon an adverse interest, to plead its nature by answer. And plaintiff is entitled to the judgment of the court, *upon demurrer*, as to whether defendant's interest thus pleaded has any foundation in law."

But respondent is wrong in claiming that its answer meets these requirements. Its affirmative plea of an adverse claim is, of course, based wholly upon the acts of congress. It pleads these acts at length, *but it pleads no facts showing that its predecessor in interest complied with them in essential particulars.* Thus the answer says nothing about filing maps, as required by those acts. It contains merely the bald conclusion of the pleader (Rec. p. 17, folio 29) that the company "*complied* with all of the terms and conditions of said several acts of congress." It is for the court to determine, upon the facts pleaded, whether or not the company complied with the requirements of the acts. It cannot be left to the opinion of the pleader. How could the court adjudge, *upon demurrer*, upon this mere statement of the pleader's conclusion, whether or not "defendant's interest has any foundation in law"?

This defect of answer was not waived by replying thereto, nor by the subsequent introduction of evidence by plaintiffs. Under the Colorado Code of practice (sec. 55), the objection that the pleading does not state *sufficient facts*, may be raised at any time, even upon appeal.

As to the proof which the plaintiffs did actually furnish, on both title and possession, we will make further reference.

Error No. 2—The Equity Rule.

On pages 12 and 13 of appellee's brief appears a claim to the effect that this case is governed by the old rules of equity practice, and that plaintiff's evidence did not overcome the weight that attaches to the answer as evidence when filed under oath, etc. As to this, we say, first, that we believe the record shows that plaintiffs' title and possession were abundantly proved, even if the answer be considered as evidence.

But this case began in the *state court*, and it is not subject to the rule referred to. We called attention to this on the last pages of our opening brief, and there cited some of the authorities pointing out the distinction, but the learned counsel for respondent seems to have overlooked them. He cites decision after decision, all of which, so far as we have had access to them, were in cases which originated in the Federal courts. We submit that appellee is wrong on this feature of its brief.

Error No. 3 - Plaintiffs' Title Complete at Beginning of Suit.

There is a serious, though probably inadvertent, misstatement *of fact* in appellee's brief on this matter. It is said (brief, pages 13, 14) that the Iliff title remained in his heirs "until *deeded* by them to

the complainants in the present action." Upon this misstatement is constructed an argument to the effect that the legal title was not in plaintiffs when they filed their complaint.

This particular objection, as well as those to the sufficiency of our proofs, was overruled and disposed of by the Court of Appeals. But the misstatement of fact is in the assertion that the Iliff title remained in his heirs until the delivery of the deed. By reference to the record (pp. 88-9), it is readily seen that, on the 25th day of March, 1901, *more than five years before this action was begun*, a decree was entered in the state court against these same Iliff heirs which vested all their title and interest in and to the property in the present complainants. That decree not only transferred all the interests of the Iliff heirs in a previous judgment therein mentioned, but it expressly transferred all their rights *in and to the lands*,—carefully describing them. At the time of the bringing of this action, the title of the plaintiffs was, and long had been, complete under said decree, and the subsequent deed was only confirmatory, as it shows on its face. Besides,

> "Proof of title, with the strictness required in actions of ejectment, is not necessary in actions to quiet title to realty."
>
> 32 Cyc. 1372, (note).

The deed alone would have sufficed, as in such equity cases plaintiff may perfect his title *pendente lite*. *Park Association vs. Lloyd*, 55 N. Y. S. 108, 61 N. Y. S. 1143. A vendor may complete the title

of the vendee, pending a suit to rescind the contract, at any time *before the trial: Clanton vs. Burgess*, 17 N. C. 13. To the same effect are,

McKinney vs. Jones, 55 Wis. 39.

Kimball vs. West, 82 U. S. 377.

Willard's Equity, p. 289.

In addition to all this is the Colorado statute, cited on page 2 of our supplemental brief, which vests the legal title to vacant and unoccupied lands in him who simply pays all the taxes thereon for seven years, in good faith, and under color of title.

Error No. 4—The Evidence of Plaintiffs' Possession.

We are next told that plaintiffs' evidence of possession of this unfenced and unimproved land is insufficient. Keeping in mind our claim that we were not required, in the condition of the pleadings, to offer any evidence whatever, we leave it to the court to examine the record to determine this question.

In *Worthley vs. Burbanks*, 146 Ind. 534, quoting the general doctrine from 2 Wood on Limitations, sec. 267, adverse possession of unproductive land was sustained on proof that plaintiff (a) recorded his deed; (b) had the land surveyed and staked; (c) went upon the land *at intervals, claiming ownership;* (d) cut some timber and built a brush fence on a small portion; and (e) paid the taxes.

The uncontradicted evidence here shows that plaintiffs exercised more open acts of ownership than could probably be shown of two-thirds of the unfenced private lands of the west.

Beside, this question also was disposed of by the Court of Appeals by its holding, over the objections of appellee, that plaintiffs could maintain this action.

Error No. 5—The Question of Color of Title.

On page 20 of appellee's brief, following the discussion of the evidence, is this statement:

"The acts of congress granting to the predecessors in title of defendant a strip of land of this width, were matters of public record, and the law presumes that the appellants were familiar therewith, and with the construction which the courts had put upon the same. *These constituted color of title, under which the railroad was in possession*, and the rule is well settled that possession of part of a tract, under color of title to the whole, amounts to actual possession of the entire tract."

The acts of congress were public record of what? That this claimed right of way would cross this particular section of land in Colorado? If this doctrine be true, this railroad company is much too modest in its demands. To be consistent, it should insist that it has had possession of the entire 160 acres "under color of title." For, if the acts of congress, *of themselves*, were public notice of anything, or constituted *color of title* to anything, then, since they contained no designation, description, or limitation of this alleged right-of-way, but left

it entirely to the company (as it claims) to locate it wherever it might please, on any land lying between the western line of Kansas and the western line of Nevada, the company must have been given color of title, not only to every acre of this particular land, but also to every acre lying anywhere between those two state boundaries.

This preposterous proposition of appellee exposes the fallacy of its entire claim. It is absurd to talk about "color of title" thus hanging in the air. If the acts of congress gave any semblance of color of title, which we deny, it could only be by applying the so-called grant to some definite tract either by describing it definitely in the grant, or by filing a map of designation, or by actual construction of the road upon the land.

The fundamental error in appellee's claim of "color of title" is in the loss of sight of the simple legal rule that such title can be conferred only by a written decree, deed, or other instrument describing the land. An act of congress might give color of title to a strip of land if it in terms described and located it.

"A patent or grant may constitute color of title, *provided the land claimed is described in the instrument.*"

1 Cyc. p. 1097.

This also disposes of appellee's further claim that our possession would not include the entire 160 acres. We have already tried to point out under "Error No. 3" that the legal title was in

plaintiffs when this action began, and had been in them and in their predecessors in interest for many, many years. That plaintiffs had at least color of title to the entire 160-acre tract by their decree accurately describing it (Trans. p. 88, fol. 139), and by their entire chain of title back to the patent, can not possibly be doubted. Now under the well known rule, suggested by counsel himself, that possession of a portion of a tract under color of title is possession of the entire tract described in the instrument giving such title, plaintiffs having such title to the entire tract, and defendant having no color of title to any of it, plaintiffs would be in possession of all, excepting, possibly, what defendant was actually occupying and using by its single track, which, as shown by the evidence, would not exceed twenty feet in width, including the one insignificant cut, and one slight fill (Trans. p. 101).

"One claiming by adverse possession, but not holding under color of title, acquires no title to any land, except what is in his *actual possession. There can be no constructive possession without color of title.*"

1 Cyc. 1122, 1123.
Warvelle on Ejectment, sec. 425.

"The possession of a railroad company which is confined to the laying of tracks and their use would not, without more, establish an adverse possession *beyond the road bed and track*, or possibly the incidental and *necessary* right-of-way, unless what it did was done under an assertion of colorof title *to the whole tract* involved and there were other

acts proven which fortified and exhibited a claim *to all the land involved.*"

Brinker vs. Union Pacific, etc., Co., 11 Colo. App. p. 168.

Moreover, appellee could acquire no rights of possession against an *insane man.* The record shows that Andy M. Adams was the real owner of this land (John W. Iliff being merely his trustee) from January 4, 1867, to December 15, 1890, and that he was insane during all that period (Trans. pp. 77-81). See *Warren vs. Adams*, 19 Colo. 515. See, also, our opening brief, pp. 38 to 40.

Error No. 6—The Resolution of May 7, 1866.

On page 44 of appellee's brief appears this statement:

"And by the resolution of May 7, 1866, the Kansas company had until June 27, 1872, at the earliest, within which *to definitely locate and construct its line of road.* Such an enactment requires no construction; its meaning is obvious."

It seems to us that this misstatement of the resolution is inexcusable, even if inadvertence be pleaded. If the court did not take the time to turn to the resolution itself, it would be entirely misled. The resolution (14 Stat. p. 355,) is very brief and very clear, and it contains not a word about *locating* the road, definitely or otherwise. It gave the company until June 27, 1866, *to complete* the first 100 miles, and fixed that date as the time from which the period for completing the remaining sections should begin, *and nothing more.*

Be it remembered that, at that time, the road was building on the Republican river route to the 100th meridian, in accordance with the act of 1864, and in accordance with *both* the maps, and the only maps, it had theretofore filed. It had not completed the first 100 miles from the Missouri river, and it was simply given further time by the resolution, not to "locate" a new line somewhere else, but to build up the Republican to the 100th meridian. And as the distance from the mouth of the Kansas river, the beginning point, to the terminus in Nebraska, on the 100th meridian, did not exceed 300 miles, the resolution extended the time for the completion of the entire road (at the rate of 100 miles per year), to June 27, 1868, instead of to June 27, 1872, as stated by our learned brother, who is evidently trying to stretch the resolution so as to reach Denver, 400 miles further away.

The resolution certainly did not relieve the company of its obligation to file maps, or to build up the Republican river, as required by the act of 1864, nor did it give any permission to locate any new route, by filing additional maps, or otherwise.

Error No. 7—The "Inferential" Right-of-Way.

"The act of 1864 authorized the line of railroad which was constructed across appellee's land, *and therefore granted the right-of-way.*"

This statement appears at the top of page 58 of appellee's brief. We believe it to be wrong *in toto*. In the first place, we hope we have already

shown in our previous brief that the Union Pacific, eastern division, was not one of the roads "authorized by this act"—the act of 1864, to build west of the 100th meridian. That act expressly limited the right to build westwardly to the roads which were authorized by *it* (not by the act of 1862) to build from the east to the meridian, *i. e.*, the new Iowa, or Sioux City, road (sec. 17) and the Burlington & Missouri River road (sec. 18). These two roads received, by the act of 1864, their first permission to build to the 100th meridian. Hence, when congress declared that any company authorized by "this act" to build to the initial point might connect westwardly of that point, it meant precisely what it said, and it was not referring to the Union Pacific, eastern division, at all.

We observe, at this point, that appellee, on p. 92 of its brief, claims that neither of the said newly named roads was authorized by the act of 1864 to build to the initial point. If section 17, in author izing the Iowa line, via, Sioux City, to connect, either with the Union Pacific branch (from Omaha to the initial point) or with the Union Pacific itself (from the initial point west), and in releasing, conditionally, the Union Pacific "from the construction tion of said branch" (from the east to the initial point on the 100th meridian, act of 1862, sec. 14), did not empower said road to construct *to* the initial point on the 100th meridian, then what could it mean? And if section 18 authorizing the Burlington & Missouri to extend its line "to some point *not further west than the 100th meridian of west longi-*

tude, so as to connect * * * *with the main trunk of the Union Pacific Railroad* (which, by the act of 1862 began at the initial point), did not authorize the Burlington & Missouri River road to construct "*to* the initial point aforesaid," then carefully written language is meaningless and useless. The mental and moral disorder from which appellee is suffering is its proneness to construe the acts with microscopic strictness when applied to all other companies and people, and with prodigal liberality when applied to its own interests.

Our view of the meaning of section 9 is further confirmed by section 12. In that section the Union Pacific, eastern division, is exclusively dealt with Therein authority to that company to build west of the 100th meridian is expressly given, but only on condition that the original Union Pacific company should fail to build the main line, in which event the eastern division was authorized to take possession of its right-of-way and build from the 100th meridian westwardly **"on the same line."**

Now if section 9 already gave appellee's predecessor in interest the right to build at pleasure, anywhere and everywhere between the 100th meridian and the Nevada line, and also generously threw in a 400 foot right-of-way, to be located anywhere and everywhere throughout that vast expanse at the pleasure of the company, as it now in effect claims, of what use is section 12? The simple truth is that the act, read as the appellee would have it read, becomes unreasonable and inconsistent to the point of self-destruction; but read with

the other view, and as this court has already interpreted it in the Harris case, it is perfectly consistent and sane.

But if the act of 1864 really authorized the building of appellee's line into Colorado, it by no means follows that it granted the *right-of-way*. This is, perhaps, the chief error of appellee's argument. We believe that it misled the learned writer of the opinion of the Court of Appeals into the mistakes therein appearing. It is the manifest error of construing mere *authority to build* into *a grant of right-of-way*. Of all the multitude of decisions of this court and other courts, cited in the briefs filed by both parties in this case, not one of them justifies any such conclusion. On the contrary, the rule has never been departed from that all such grants must be clearly expressed, and cannot be based on mere implication or inference.

Dubuque & Pacific Railroad Company vs. Litchfield, 23 How. 66.

Leavenworth, Lawrence & Galveston Railroad Company vs. United States, 92 U. S. 733.

Error No. 8—Relation of Map to Right-of-Way.

On page 76 of its brief, appellee says that the filing of the map as required by the act had no relation to the right-of-way, but that its function was wholly to enable the Secretary of the Interior to withdraw the subsidy land, etc. But how could the land be withdrawn except by reference to the

right-of-way? Section 19 of the act of 1864 provides that the land should be withdrawn to the amount of 10 alternate sections per mile, *on each side of said road.* The first thing contemplated by the map would be the line of road, the right-of-way, and the subsidy lands would necessarily be measured from that.

The case of Missouri, K. & T. Ry. Co. vs. Cook, 163 U. S. 491, 16 Rep. 1093, is especially in point here. We are indebted to appellee for citing it, as we seem to have overlooked it. It is distinctively a right-of-way case, under the congressional grants. Read it, and see how thoroughly it demolishes the theory that the filing of the maps has "nothing to do with the right-of-way."

It will be observed that Chief Justice Fuller, who wrote the opinion, had the Baldwin case, the Dunmeyer case, the Van Wyck case and the Knevals case (all cited by appellee) directly before him and in mind, for he refers to all of them. Yet he says:

"We think that by the filing of the map of the line surveyed, the route was definitely fixed, within the intent and meaning of the act; and, while the principal object in filing the map was to secure the withdrawal of the lands granted, *it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right-of-way.*"

The foregoing case, followed by the Harris case to the same effect, is sufficient to settle this controversy.

On page 87 of his brief, counsel closes the summary of his argument on this feature with the words (parentheses ours):

"(d) That, in the instant case, the line of railroad was not definitely located until the actual construction thereof (quite true), upon which the grant of the right-of-way attached to the line as so constructed (this would be true if any right-of-way had been granted), but took effect as of the date of the act of 1864 (which would be true if the act of 1864 had granted such right-of-way, and if these words were added, '*as to the lands to which no other rights had attached meantime.*')"

We repeat that NO decision has been found to the effect that the title of a settler, initiated after the railroad grant, but before the filing of map or other location of the road, and subsequently perfected by patent, is still subject to the grant. The right of the settler is still stronger where, as in this case, he made his entry after the right to file map had expired.

Much confusion has arisen over the words "grant *in præsenti*". The railroad companies, in many instances, seem to believe that by those words they have obtained a much higher and better title than the government itself possessed. They act as though they believe the words bestow a much more comprehensive title upon them than the same words would confer upon any other citizen, or even upon a state, though made by the same authority.

The millions of acres of land that have been granted to the soldiers of the country were "grants *in præsenti*," and certainly of greater breadth than that of any right-of-way to any railroad company, required to build within certain bounds, for the grants to the soldiers might be located anywhere on the public domain. Still, these land warrants have never been held to be an appropriation of any specific land *until properly located*. So, also, the grants of the millions of acres that have been made by the general government to the various states for school and other public purposes were all "grants *in præsenti*," and still they did not take effect, or attach themselves to any particular lands, until said lands were identified and surveyed, and such surveys approved by the government. This shows that all grants of land, or at least all those that are characterized as *in præsenti*, are upon the same basis. They are all *floats* until the land is properly identified or located, and thus segregated from the public domain.

Error No. 9—The Land Grant of 1864.

In disputing our claim that the act of 1864 did not authorize appellee's predecessor to build into Colorado, on pages 95 to 97 appellee argues that that act must be read with that of 1862, because, in section 11, it provides that "no land granted by *this act* shall be conveyed, etc.," whereas appellee says "no land is *expressly* granted by the act of 1864." The word "expressly" is an ingenious interpolation by appellee. Does appellee mean that its prede-

cessor obtained no lands by the act of 1864? Will counsel say that the enlargement of the grant by the amendments contained in section 4 did not have the same effect as if the additional land had been "expressly" granted by that act? We think not. The trouble with the argument is that the proviso in section 11 does not read, "that no land *expressly* granted by this act, etc.," and the language is entirely sufficient of itself, without coupling it with that of the original act.

Error No. 10—Appellee's Attempted Evasion of its Answer.

Beginning on page 115 of its brief, appellee seeks to withdraw its own solemn admissions. It attempts to question the Eastman title, and to deny its inception on June 18, 1866, although in its sworn answer to the amended complaint it *expressly admits* that Eastman settled upon the land and filed the declaratory statement of entry thereof under the pre-emption laws that day; that he purchased the land from the United States and received its certificate thereof; and, that *in pursuance of said entry*, patent therefor issued to him October 1, 1867. (Trans. p. 27). In view of this, we surely are not required now to debate that subject with appellee, especially since the Court of Appeals has held in this case that its admissions are conclusive against it, and that, even if they were not, the evidence in the record is directly contrary to its present claim (178 Fed. 755, 756).

Error No. 11—The Attack on the Act of 1912.

We have no time in which to enter upon a defense of this act. It is not necessary that we should do so. It would be a strange doctrine that would condemn it as "unconstitutional" for assisting appellee to do precisely what it has insisted on doing by its agreements and conveyances. We called attention to it in connection with our claim of title under the Colorado revenue laws, and as the congressional recognition of the power of the state to seize a railroad right-of-way for non-payment of taxes, and to vest the title in the citizen who does pay them. In this case, the act adds nothing to the law as already frequently declared by this court, and which is again expressed by a learned author as follows:

"Railroads under and controlled by private corporations are, in a certain sense, public conveniences and agencies, but they constitute no part or branch of the government, either state or national, and are not properly govermental agencies, even though the government may employ them for the transportation of its troops, its mails, etc., or for other purposes. The corporations owning them are consequently entitled to claim no exemption based on an implication that they are essential to the operations of the government. They are therefore taxable as natural persons would be whom the government might employ for the performance of similar services. Congress has power to exempt from taxation the right-of-way, through the public domain, of a railroad corporation chartered by it, the corporation being in a sense an instrumentality of the government."

1 Cooley on Taxation, 3d ed. p. 139.

All such property is so liable, *unless congress expressly exempts it.* In this connection, it is significant that in neither of the Union Pacific acts of 1862 and 1864, or the later ones, is there any provision exempting from taxation any right-of-way therein mentioned; whereas, in the Northern Pacific act of 1864, adopted on the same day as the Union Pacific act last mentioned, there is a clause (sec. 2) expressly exempting from taxation within the territories the right-of-way thereby granted. And it will be borne in mind that the cases, *Northern Pacific vs. Townsend*, 190 U. S. 267, *Northern Pacific vs. Ely*, 197 U. S. 5, and *Northern Pacific vs. Hasse*, 197 U. S. 9, so much relied upon by appellee in support of its claim that the right-of-way "could not be lost, etc.," were under the Northern Pacific act.

Nor can the company avoid the result by its plea that it paid taxes on the right-of-way through the state board of equilization (of which, as we have seen, there is not a word of *evidence*,—nothing but the hearsay statements and conclusions of its witness, Scribner,) for the reason that nothing but its track and road-bed could be legally assessed by the state board. The company proved in this case that it has been leasing for gain at least 300 feet of this strip (see map attached to its brief), and it was therefore properly assessed by the county officers, to whom plaintiffs paid the taxes.

"Under either theory, land not used as part of the roadway, or right-of-way, though bought with the intent to use it for that purpose when neces-

sary, is not a part of the road-bed, and should be assessessed by the local assessors. So it has been held that land belonging to railroad companies, and leased for commercial purposes, will not be regarded as 'necessary or in use in the proper operation' of the road, and is to be assessed by the local officers."

2 Elliott on Railroads, 2d ed. sec. 38 a; citing Grand Rapids Railroad Co. vs. Grand Rapids, 137 Mich. 587.
Adams Co. vs. Kas. C. R. R. Co. (Neb.), 49 N. W. 245.

Appellee's map attached to its brief, as above mentioned, designates the land it leased to Ruedy, Herrick and Midgett, the same being 300 feet out of the 400 foot right-of-way claimed. This suit was commenced April 1, 1906 (Trans. p. 1). These leases bear date July 1, 1906, and are for three years (Trans. pp. 158 to 164). An examination of the testimony relating to them will create a suspicion that the company was trying to manufacture evidence. But we say that none of the improvements shown on this map, saving only the track, telegraph poles, and some broken snow guards, were on the ground prior to the commencement of this suit (Trans. pp. 35 to 37; 40 to 42; 48 and 49). The books of this company would certainly have told the exact date of every fence or other improvement placed on its right-of-way. Why were not these books introduced by it, instead of leaving the matter to the guess work of one or two of its employees?

But do not these leases show an abandonment of

all claims of the defendant to, at least, 300 feet of the strip claimed? The only use it pretends to make of the leased ground is for agricultural purposes (see Lafferty's testimony, Trans. pp. 144 to 148). No grant ever gave a railroad company any right to rent out to farmers, or others, its right-of-way.

It will be borne in mind that this is not an action for *possession* (ejectment), but is brought simply for the purpose of quieting title. The complaint is ample for this under the state law, and it is also sufficient under the old equity rules of this court. Thus the complaint states many things not necessary under the statutory provisions to quiet title merely. (a) The full and complete title of the plaintiffs set forth, and shows that the title involved a trust; (b) It alleges that the wrongful claims of the defendant render plaintiffs' title unmarketable, and are a cloud upon plaintiffs' title, to be removed by a decree, etc.; (c) Three defendants are named, and it is alleged that they are each making claims. The varying claims could not be adjusted in a single suit in ejectment, and no court would compel the plaintiffs to bring three suits when one would accomplish the purpose. (d) The complaint not only shows that a trust is involved, but also that this trust was in behalf of an *insane person*,—a matter purely within the jurisdiction of equity; (e) The title of plaintiffs was charged to be clouded by a burden of taxes, also, that they had been compelled to pay upon any right-of-way defendant

could have. This also was a matter of equity jurisdiction.

But, as we have already suggested, the right of appellants to maintain this action upon the complaint as filed has been established by the Court of Appeals. It has declared that, on account of the peculiar circumstances involved, appellants are entitled to have their rights "completely and adequately determined by a *suit in equity*, in the nature of one to quiet title, etc." (178 Fed. p. 757). We have, from time to time, in these briefs called attention to other questions which are disposed of by the opinion below. This case is here upon a writ of *certiorari*. Appellee has assigned no errors upon, and has taken no appeal from, any rulings against its claims. As we understand the rule of practice, it is therefore bound by such rulings, and the case is before this court solely to review the errors complained of by appellants.

Hubbard vs. Tod, 171 U. S. 474.

Montana M. Co. vs. St. Louis M. Co., 186 U. S. 31.

Respectfully submitted.

THOMAS B. STUART,
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Attorneys and Solicitors for Appellants.

OPINION

STUART *v.* UNION PACIFIC RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 135. Argued January 22, 1913.—Decided February 24, 1913.

It has already been decided by this court that the Kansas Pacific Railway Company had a right to build west of the one hundredth meridian.

It has also been heretofore decided that the Pacific Railroad Acts of July 1, 1862, and July 2, 1864, should be considered and construed as one act.

A right of way is a substantial and obvious benefit and if a railroad is entitled to a right of way under an act, it is entitled thereto under a later act extending the route and granting all benefits given under the earlier act.

Even though the record may not show that all the maps of definite location had been filed, a railroad company may acquire under the acts of 1862 and 1864 a right of way by actual construction of the road.

A railroad obtaining a right of way under the acts of 1862 and 1864 retains title thereto whether occupied by it or not.

All persons acquiring public lands after the passage of the Pacific Railroad Acts took the same subject to the right of way conferred by them on the proposed roads. *Railroad Co.* v. *Baldwin*, 103 U. S. 426.

Where the claimants to the same land have both paid the taxes thereon continuously, they stand on equal footing, and the payment does not establish adverse possession.

Under the acts of 1862 and 1864 the Kansas Pacific Railway Company had authority to build west of the one hundredth meridian to Denver and was entitled to a right of way two hundred feet from the center of the track, and that right is superior to claims initiated after the act of 1864, even if prior to the construction of the road; and this right is not defeated by adverse possession.

178 Fed. Rep. 753, affirmed.

THE facts, which involve the title to certain portions of the right of way of the Kansas Pacific Railway now

owned by the Union Pacific Railroad, are stated in the opinion.

Mr. Charles A. Murray, with whom *Mr. Thomas B. Stuart*, *Mr. Louis T. Michener*, *Mr. Perry G. Michener* and *Mr. Joseph C. Helm* were on the brief, for petitioners.

Mr. Clayton C. Dorsey for respondent.

Mr. Joseph C. Ewing, by leave of the court, filed a brief as *amicus curiæ*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to quiet title to the E. ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of Section 20, Township 38, Range 67 West, situated in the city and county of Denver (formerly in Arapahoe County), State of Colorado.

The suit was brought in the District Court of the city and county of Denver against the Kansas Pacific Railway Company, the Colorado Eastern Railroad Company and the Union Pacific Railroad Company and removed on the petition of the latter company to the United States Circuit Court for the District of Colorado, on the ground of a separable controversy. A motion to remand was made and denied. The railroad company answered, joining issue as to so much of the lands as constituted a tract 200 feet in width on each side of its road. It asserted title as successor of the Kansas Pacific Railway Company, which had been granted the tract as a right of way, it was alleged; by the acts of Congress generally denominated the Pacific Railroad Acts.

The discussion in the case will turn upon the title of the railroad rather than upon the title of petitioners. There is

no question of their title if that of the respondent company be not good. The Circuit Court held that the title of the company was good and dismissed the bill. The Circuit Court of Appeals decided that the dismissal of the bill was error; that the court should have recognized the company's title to the right of way and have quieted petitioners' title to the remainder. The decree of the Circuit Court was modified accordingly. 178 Fed. Rep. 753.

The Pacific Railroad Acts have been before this court so many times that it seems unnecessary to make further quotation from them. The first of them was passed July 1, 1862 (12 Stat. 489, c. 120): the second one, July 2, 1864 (13 Stat. 356, c. 216), and two others respectively on July 3, 1866 (14 Stat. 79, c. 159), and March 3, 1869 (15 Stat. 324, c. 127). Their relation constitutes the controversy in the case, and, simply stated, it is whether the right of way granted to the Leavenworth, Pawnee & Western Railroad Company, the name of which was changed in 1863 to Union Pacific Railway Company, Eastern Division, and in 1864 to the Kansas Pacific Railway Company, terminated at the one hundredth meridian or extended westward of that point to Denver. The petitioners contend for the former; the railroad company, for the latter.

The explicit contention of petitioners is that the right of way granted to the Kansas Pacific Railway Company (we use the latest name) does not extend to the lands in question, for that company, under its first name of Leavenworth, Pawnee & Western Railroad Company, and all other eastern branches of the main line were authorized to build only to the one hundredth meridian, and no farther.

The main line was, under the act of July 1, 1862, authorized to be constructed by the Union Pacific Railroad Company westward through Cheyenne to the western boundary of Nevada and possibly farther to meet the Central Pacific Railroad, which was authorized to

build from the coast eastward. To the main line so constituted grants of land and bonds were made and a right of way was granted through all public lands "200 feet in width on each side of said railroad where it may pass over public lands." The initial point of the Union Pacific was to be the "100th meridian . . . between the south margin of the valley of the Republican and the north margin of the valley of the Platte, in the Territory of Nebraska."

Section 9 of the act authorized the Leavenworth, Pawnee & Western Railroad to construct a road from the Missouri river at the mouth of the Kansas "to the aforesaid point on the 100th meridian . . . upon the same terms and conditions in all respects" as provided for the main line. The road was required to be so located through Kansas as to be between the mouth of the Kansas river and the designated point on the one hundredth meridian, and, it was provided, that the several roads from Missouri and Iowa authorized by the act to connect with the same could make the connection within the limits prescribed in the act, providing it could be done without deviating from the general direction of the whole line to the Pacific coast.

There is no uncertainty in the act of 1862. The initial point of the main line was the one hundredth meridian, and at that point the Leavenworth, Pawnee and Western Railroad Company (now the Kansas Pacific Railway) and other eastern branches were to connect with the main line.

The next act is that of July 2, 1864, and on its provisions arise the principal controversy in the case. It is contended by the respondent railroad company that the act authorized the Kansas Pacific road (then, as we shall see, the Union Pacific Railroad, Eastern Division) to build westward of the one hundredth meridian, and granted it, besides certain sections of the public lands, a right of way

400 feet wide, 200 feet either side of the center of its track. Petitioners oppose the contention and insist that the act only aimed to provide for the convenient connection of certain branch roads with the main trunk line at or near the one hundredth meridian and did not extend a right of way to any branch beyond the one-hundredth meridian. Comparing the two acts, petitioners say that the act of 1862 referred solely to the right of way through *public* lands. The act of 1864 referred solely to condemnation of right of way through *private* lands and to granting facilities of connection with the Union Pacific through ferries and bridges over navigable rivers. The permission to build westwardly, it is further urged, was not given to all branches but only to such as were made branches by the act of 1864. The contentions are earnestly argued and are made to rest mainly on § 9 of the act.

The act of 1864 was entitled "An Act to amend" the act of 1862, and it was provided by § 9 that " . . . any company authorized by *this* act to construct its road and telegraph line from the Missouri river to the initial point aforesaid [100th meridian] may construct its road and telegraph line so as to connect with the Union Pacific Railroad *at any point westwardly of such initial point*, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, *such company shall be entitled to all the benefits*, and be subject to all the conditions and restrictions, of this act: Provided further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided." (Italics ours.)

At the time of the passage of that act the Leavenworth, Pawnee & Western Railroad Company (now the Kansas Pacific Railway Company) was known as the Union Pacific Railroad Company, Eastern Division, in accordance with lawful authority given in 1863. The time for the completion of its line was extended, and by the act of July 3, 1866, it was given until December 1, 1866, to file the map of general route. Upon filing the map the lands along the entire line of the general route were to be reserved by the Secretary of the Interior. It was provided that the company should be entitled only to the same amount of bonds "as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the 100th degree of longitude as now required by law. And, provided further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

By applying very simple rules of construction to these acts and from a consideration of their purpose and the means which were deemed necessary to accomplish that purpose, we should have to reject the contention of plaintiffs. We are relieved, however, of the necessity of a lengthy discussion and one which we might consider necessary, in deference to the earnestness of counsel, by the previous decisions of this court and may rest our judgment on their authority.

The acts of Congress came up for consideration and construction in *Missouri, K. & T. Ry. Co.* v. *Kansas Pacific Ry. Co.*, 97 U. S. 491, 494, upon the very points now involved. The contest was between the two railroad companies as to which was entitled to certain lands, whether the Kansas Pacific Railway Company took them under the act of 1862 as amended in 1864, or whether the Missouri &c. Railway Company was entitled to them under a grant to it made July 26, 1866. It is mani-

fest that the issue presented was an important one and had important consequences. The court intimated that principles and considerations upon which it should be decided affected other rights as well as those contested and necessarily gave them a proportional consideration. The opinion demonstrated it. It was decided that the act of 1862 and that of 1864 practically constituted one act, and the enlargement by the latter of the grant made by the former took effect at the date of the former; and "this was done," it was said, "not by words of a new and additional grant, but by a change of words in the original act, substituting for those there used words of larger import." It was further decided that the act of 1864 "authorized the plaintiff [the Kansas Pacific Railway Company] to construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of its initial point, in case it deemed such westward connection more practicable or desirable." This is the language, it will be observed, of § 9 of the act of 1864. The court used it as the best means of expressing the purpose of the act.

In *United States* v. *Kansas Pacific Ry. Co.*, 99 U. S. 455, the extent of the grant made by the acts of 1862 and 1864 again came up for decision, and upon issues more pertinent to the present controversy, if possible, than those in the other case. The case concerned the extent of the lien of the Government and the liability of the company for 5% of the net earnings of that portion of the road of the company west of the one hundredth meridian. The answer was considered as turning on the construction of § 9, *supra*. Commenting on its provisions, the court said (p. 457): "It thus appears that whilst the company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension."

The road was actually built to Denver, 245 miles beyond the one hundredth meridian, and upon this part of the road the Government claimed a lien as well as upon the road east of the meridian. Passing on the claim, the court said (p. 457): "A material question in this case is, whether the whole line to Denver, or only the line which the company was first authorized to construct (which terminated at the one hundredth meridian), is liable to the lien for the government subsidy, and the payment of five per cent. of net earnings." Answering the question, it was observed (p. 458): "From a careful examination of the statutes relating to this subject, we are of opinion that, whilst, as to its entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act,' and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the five per cent. of the net earnings is only demandable on the net earnings of said portion." See also *United States* v. *Union Pacific Railway*, 148 U. S. 562; *Kansas Pacific Ry. Co.* v. *Dunmeyer;* 113 U. S. 629.

It may be said that *Union Pacific Railroad Co.* v. *Harris*, 215 U. S. 386, puts a different construction upon the acts of 1862 and 1864 from that received in the cases cited, and, it must be admitted, there is language in the opinion which may be so understood, but that it was not so intended is made clear by *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, where it is again declared that under congressional authority the route of the road was changed so that its connection with the Union Pacific Railroad would be made at a point farther west than was originally intended.

These cases decided that the Kansas Pacific Railway Company had a right to build west of the one hundredth meridian. It is not necessary, therefore, to consider the special features of the acts upon which petitioners rest their contention that the Kansas Pacific had no such right. The basic one, however, we will mention, lest it be thought that we have overlooked it or have not properly estimated its force. It is that the acts of 1862 and 1864 should not be considered and construed as one act; that though their provisions had relation in some instances, in others they had independent effect. Section 9, it is contended, is of the latter character, and is given a specific application by the proviso which is in the following words: "And provided further, That any company authorized by *this act* [italics ours] to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point." It is contended that these words exclude the Kansas Pacific Railway Company because the only two railroads authorized by "this act" to be constructed were the Sioux City Railroad (section 17) and the Burlington & Missouri River Railroad (section 18). But that the words "this act" should have such limited application was necessarily involved in the other cases and was adversely decided.

We have seen that the act of July 3, 1866, extended the time of the Union Pacific Railroad Company, Eastern Division (now the Kansas Pacific), to file its map of general route and provided for a reservation of land all along the route; but it also provided that the company should be entitled only to the same amount of bonds as it would have been entitled to if it had connected its line "with the Union Pacific Railroad on the 100th degree of longitude *as now required by law.*" (Italics ours.) It is insisted by petitioners that this provision is a legislative construction

of the act of 1864 and "conclusive upon the point that it was defendant's [Kansas Pacific Railway, then Union Pacific Railroad, Eastern Division], duty at the date of said act to unite with the Union Pacific Railroad at the 100th meridian, and has the same effect as a special enactment of that date to that effect." The Court of Appeals rejected this contention, and construed the provision not as requiring the connection of the roads to be at the given meridian but as declaring that there should not be issued to the company bonds for a greater amount than if there had been a union with the Union Pacific at that point. And this necessarily must have been determined to be the true construction in the cited cases. We have said, perhaps with unnecessary repetition, that all the acts were under consideration in those cases and their true relation and meaning decided.

There are specific contentions addressed to the grant of the right of way. Some of them involve the element that the acts of Congress granted no right to the Kansas Pacific Railway Company to build west of the one hundredth meridian. That we have disposed of. Some of them are based on the following propositions: (1) that a grant of the right of way cannot be implied; it must actually exist in express words; (2) it cannot be implied from the use of the word "'benefits,'" as there are many other benefits in the same act to which that word more aptly applies; (3) it is shown by the act that it never was intended to apply to the right of way. The last two contentions may be immediately rejected. The act manifestly applies to a right of way, and there is no distinction made between "benefits," for the language is "shall be entitled to all the benefits," save that of receiving bonds. A right of way is a substantial and obvious benefit. *Railroad Co.* v. *Baldwin*, 103 U. S. 426, 430.

There are two other contentions which deserve more extended comment. They are, (a) "that the act of 1864,

being simply an option offered to certain roads to build westwardly," etc., it must be shown that they accepted said option by filing maps thereunder, changing the old route and designating the new one. (b) "That the grant of a right of way is necessarily in the nature of a float, although a grant *in præsenti*, like a military land warrant. It becomes fixed only by filing a map of definite location or by actual construction."

In reply to these contentions the respondent company insists that neither a map of general location nor of general route was necessary to the acquisition of a right of way; that actual construction would secure it. The evidence as to filing maps is somewhat uncertain. The Court of Appeals in its opinion says: "There was some evidence indicating that a map, showing the general route of the railroad westwardly to the eastern Colorado line, was filed with the Secretary of the Interior prior to November 30, 1866, the date not being more definitely stated; that a map showing the general route from the eastern Colorado line to Denver was accepted by that officer November 30, 1866, and that a map showing the definite location of the railroad to Denver was filed in the land office at Denver September 24, 1870; but none of the maps, nor any better statement of what was shown thereon, was offered in evidence."

It is, however, admitted by petitioners that a right of way could be acquired by actual construction of the road, and the railroad company finally rests its title on actual construction of the road under the granting acts. It admits that "the line of railroad was not definitely located until the actual construction thereof." But it is contended that upon its construction "the right of way attached to the line as so constructed, but took effect as of the date of the act of 1864." In other words, it is contended that the right of way granted by the acts is given definite location and precision by the construction of the road and

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xtends to the width of 200 feet from the center line of the rack. This contention is supported by the decisions of his court. *Northern Pacific Railroad Co.* v. *Smith*, 171 J. S. 260. See also *Northern Pacific Ry. Co.* v. *Townsend*, 90 U. S. 267. The road was actually constructed through Denver and to a connection with the Union Pacific at Cheyenne and over the lands in controversy in 1870, and as been in operation ever since. But the right of way to ts full width has not been occupied and used. This, nowever, makes no difference. See cases cited immediately above and *Northern Pac. Ry. Co.* v. *Hasse*, 197 U. S. 9; *Missouri, Kansas & Texas Ry. Co.* v. *Cook*, 163 U. S. 91, 497.

In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in præsenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a preëmption or homestead claim had attached, at the date of definite location. Of such a difference between an unconditional grant of a right of way and a qualified grant of alternate odd-numbered sections this court said, in *Railroad Co.* v. *Baldwin*, 103 U. S. 426, 430: "The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of present grant with respect to the

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right of way the same construction which we should b compelled to give, according to our repeated decisions to the grant of lands had no limitation been expressed We are of opinion, therefore, that all persons acquirin any portion of the public lands, after the passage of th act in question, took the same subject to the right of wa conferred by it for the proposed road."

Petitioners rely upon adverse possession, established, a it is contended, under the statute of Colorado by the pay ment of taxes, and invoke in connection with such adverse possession the act of June 24, 1912, 37 Stat. 138, c. 181 entitled "An Act legalizing certain conveyances heretofor made by the Union Pacific Railroad Company."

Section 1 of the act legalizes all conveyances made by the railroad and railway companies to which grants of a right of way have been made, as we have stated, to the extent that the conveyances "would have been legal o valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee simple title." It is further provided that where adverse possession is claimed of any part of such right of way under the laws of the State where the land i situated, such adverse possession shall have the same effect as though the right of way had been granted absolutely o in fee simple instead of being granted as a right of way. Of the effect of this act we are not called upon to expres an opinion other than to say that it cannot avail peti tioners, for the record shows that the respondent com pany also returned the right of way for taxation and paid the taxes thereon. In that respect the parties are o an equal footing.

Decree affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.